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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1352

ROBERT B. J. MULVANEY and MILTON YORMARK,
Petitioners,

v.

STATE OF NEW JERSEY,
Respondent.

PETITION OF ROBERT B. J. MULVANEY AND MILTON YORMARK FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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tioner Yormark was also sentenced on a three-count non-conspiracy indictment which had been consolidated for trial.[1]

The Appellate Division of the Superior Court of New Jersey affirmed the convictions with opinion.[2] Petitions for certification to the New Jersey Supreme Court were denied without opinion on February 1, 1972.[3] This Court's jurisdiction is founded upon 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

A. As to Petitioner Mulvaney

1. For Double Jeopardy purposes, what criteria determine whether, after a prior acquittal, a second prosecution for conspiracy extracted from the same continuing scheme, is a prosecution for the "same offense"?

2. Whether a State, possessed of the relevant evidence, may "hold back" a second conspiracy indictment, thereby precluding a motion for consolidation, without violating the prohibition against prosecutorial harassment under the Due Process clause of the Fourteenth Amendment?

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[1] On the non-conspiracy indictment, Yormark was sentenced as follows: on the first count to a term of eighteen months, to be served after the sentences imposed on conspiracy indictment and to a fine of $1,000; on the second and third counts, to a term of eighteen months, to be served concurrently with the conspiracy sentence.

[2] (Pet. App. A, p. 25), References (Pet. App.) are to the Appendix.

[3] (Pet. App. A., pp. 23-24).

3. At a second conspiracy trial do the collateral estoppel principles of *Ashe* v. *Swenson* bar a State from relitigating, in the form of "similar transaction" evidence, an "ultimate fact" which was the basis of a jury acquittal as to that transaction at a prior trial?

B. As To Petitioner Yormark

4. Whether, in a conspiracy case, a joint trial conducted in violation of Double Jeopardy principles denies due process to a joined defendant.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . ."

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> ". . . nor shall any State deprive any person of life, liberty or property, without due process of law . . ."

I. STATEMENT

Petitioner Dr. Robert Mulvaney has been twice tried in the State of New Jersey for conspiracy to obtain money under false pretenses from the Maryland Casualty Company. The two indictments, and the proof adduced at the two trials, demonstrate that although the State charged four distinct conspiracies, only one conspiracy, if any, was proved.

Moreover, having been acquitted of participation in that conspiracy, petitioner Mulvaney was convicted at a second trial for the same offense upon evidence rejected by the prior jury. Petitioner Yormark, a lawyer who was not tried previously, was also convicted at the second contaminated trial, upon evidence cleared of criminal significance by the first jury.

A. The First Conspiracy Trial—Acquittal

In May, 1969, Dr. Mulvaney was named as one of three defendants in a six-count indictment charging three counts of conspiracy to obtain money under false pretenses and three substantive crimes in the form of three accident claims which were the alleged objects of the conspiracies.[4] The charges grew out of the preparation and filing of three accident claims on behalf of three fictitious claimants against the Maryland Casualty Company. There was the "Mozzocca claim", which became the evidentiary basis for the "Mozzocca conspiracy"; the "Vesper claim", which became the "Vesper conspiracy"; and the "Lewis claim", which became the "Lewis conspiracy." The indictment charged that these conspiracies transpired over a period from September 15, 1966 through February, 1968, during which each of the object-claims was filed and paid.

The State's principal witness at this first trial of petitioner Mulvaney was Cortese, an unindicted co-

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[4] Essex County Grand Jury Indictment No. 2314-68. (Pet. App. A., pp. 61, As modified by a subsequent application by the prosecutor (Pet. App. A., pp. 71).

conspirator. Cortese, as an insurance adjuster for the Maryland Casualty Company, was the central or "hub" figure in each alleged conspiracy. He testified that he thought himself capable of processing fraudulent claims with minimal risk and thus formulated a plan to exploit his perceived advantage. Shortly before each of the three claims was to be submitted, he would call another defendant, attorney Perwin, and tell him to forward a letter of representation to the Maryland Casualty Company, setting forth the names of the fictitious accident victims, the date of the "accident" and a demand for settlement. Cortese also testified that, on each occasion, he instructed Perwin to obtain medical bills for the victims. For two of the three claims the medical bills were ultimately supplied by Dr. Mulvaney.[5] There was no evidence, however, that Cortese knew of Mulvaney, ever spoke to him, or indeed cared who the doctor Perwin used would be.

At this first trial, Mulvaney was acquitted on all counts.

B. The Second Conspiracy Trial—Conviction

In September, 1969, prior to trial on the first indictment, the grand jury returned two non-conspiracy indictments charging attorneys Yormark and Perwin with substantive false pretenses crimes arising from a fourth fraudulent accident claim. This was the "Taylor claim" in which Cortese again served as

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[5] On the third claim, although Mulvaney was charged, another doctor entirely was involved.

the insurance adjuster.[6] This claim, like the three others, became the inferential basis for a conspiracy charge—the "Taylor conspiracy"—embodied in a second conspiracy indictment under which petitioner Mulvaney stands convicted.

This second conspiracy indictment was returned in December, 1969, after all the evidence had been presented in the first Mulvaney trial, but before closing argument. It was a one-count indictment charging doctors Mulvaney and Brizard and attorneys Yormark and Perwin with conspiring to obtain money under false pretenses from the Maryland Casualty Company. Again, Cortese was named as an unindicted co-conspirator, again he was the inside "hub" of the alleged conspiracy, and again he was the Government's key witness.

Accordingly, after acquittal at the first trial, petitioner Mulvaney moved to dismiss that indictment, contending that his acquittal on the first conspiracy barred a second prosecution for the same offense. The trial court denied petitioner's motion and stated:

> "In the first Indictment which was heretofore tried the charges of conspiracy were based on three non-existent accidents while in the indictment at bar the charge of conspiracy is a separate and distinct charge based on one non-existent accident happening at a separate time, a different place and involving different principals."[7] (T-85-11)

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[6] Indictment Nos. 1194-69 and 1195-69.

[7] (T-85-11) Reference (T-) are to the transcripts of the second Mulvaney trial. No transcript exists for the first

The "Taylor conspiracy", however, took place during the same time period and involved the same *modus operandi* as the "three conspiracies" of which Mulvaney had been acquitted. Again, Cortese testified that he was the prime architect, that he used the services of lawyers and doctors in the precise manner that he had in the Vesper, Lewis and Mozzocca claims, that the plan involved fictitious accident victims, fictitious letters of representation and fictitious medical bills. (T-630-7)

The "Taylor claim" was devised on the heels of Cortese's success with the Vesper claim and on the verge of consummating the Lewis claim.[8] So he de-

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trial, although the stenographer's notes have apparently been retained.

[8] The four conspiracies charged were alleged to have continued throughout the following periods:

	1966				1967										1968	
	Se	Oc	No	De	Ja	Fe	Ma	Ap	May	Jun	Ju	Au	Se	Oc	No	De	Ja	Fe
FIRST TRIAL																		
Vesper Conspiracy (9/15/66 to 2/1/67)	•		Vesper		•													
Mozzocca Conspiracy (3/11/67 to 10/12/67)							•		Mozzocca				•					
Lewis Conspiracy (2/1/67 to 2/16/68)						•					Lewis							•
• • •																		
SECOND TRIAL																		
Taylor Conspiracy (8/1/67 to 2/1/68)												•		Taylor				•

cided to expand the scope of his artistry. He fabricated two, rather than one, set of claimants in the Taylor claim. (T-630-13 to 20). Accordingly, he needed two lawyers and two sets of medical bills. Again he contacted the lawyers only, Perwin and this time Yormark, and told each of them to secure medical bills. (T-632-6, 645-21) These bills were obtained from Dr. Mulvaney (by Perwin) and from Dr. Brizard (by Yormark). With respect to the set of claimants billed by Mulvaney, there was evidence that people appearing to be those claimants were actually examined by him. (T-4525-17 to 4526-8, 7403-17 to 7403-20, 4263-17 to 4265-1) And again there was no evidence of any contract between Mulvaney and Cortese.

On direct examination, Cortese testified that prior to calling Perwin he told an associate about the specifics of the Taylor claim and that he would "get" Perwin to do it. (T-630-22) He was confident of Perwin's cooperation prior to the phone conversation in which, according to the State's theory, Perwin joined the Taylor conspiracy. Mulvaney was then contacted by Perwin and ultimately submitted his medical report to Perwin and obtained payment from him. (T-3330, 3750-17)

It was Mulvaney's defense, in this case as in the first, that he was an unknowing participant in whatever scheme may have existed. (T-9991-15, 9992-1 to 9995-8) He saw patients on referral from Perwin. They each avowed complaints arising from accidents. And his examinations and reports were paid

for on bills submitted to Perwin. Thus, if these complaints were fictitious, arising from fictitious accidents, Mulvaney had been duped as well.

To rebut this defense of innocent implication, the State offered a species of evidence to prove guilty knowledge that forms one basis for this petition.[9] Even though Mulvaney had been acquitted at the first trial of any wrongdoing in connection with the Vesper, Mozzocca and Lewis claims, evidence of those claims was offered and admitted here to show a "working relationship" between Perwin and Mulvaney and to cast a sinister shadow upon Mulvaney's claim of unknowing participation.

The predicate of the State's argument for the admissibility of this evidence was the similarity of the Taylor conspiracy to the Vesper, Mozzocca and Lewis "conspiracies", and the similarity of the roles which Perwin and Mulvaney played in all four episodes.[10] (T-2618-12, 2636-20, 2819-19, 2846-8, 3841-20, 3843-14, 3846-10, 10,352-4, 10,371-7, 10,378-20, 10,352-4, 10,379-6)

Thus, the State took conveniently opposing positions. The three prior accident claims were said to be no part of this conspiracy so that double jeopardy was not entailed by the prior acquittal. Yet, they

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[9] See the argument on Question Presented No. 3 at pp. 18-19, *infra*.

[10] In affirming the admissibility of these prior acts, the Appellate Division conspicuously concluded that they demonstrated "the existence of a common scheme or plan to defraud the insurance company." (Pet. App. A., p. 42)

were said to be sufficiently similar to justify their incriminating use here, even though the prior jury had exonerated Mulvaney of any criminal implication with respect to them.

On appeal from the Taylor conviction, petitioner Mulvaney contended that his trial was in violation of the Double Jeopardy clause. Petitioner Yormark renewed a pre-trial contention that he had been denied due process by his joinder in a contaminated prosecution.

II. REASONS FOR GRANTING THE WRIT

A. To Define Double Jeopardy Criteria in Conspiracy Cases

The terms of the Fifth Amendment itself guarantee that "for the same offense" no person may "be twice put in jeopardy." The very core of that guarantee "protects against a second prosecution for the same offense after acquittal." *North Carolina* v. *Pearce*, 395 U.S. 711, 717 (1969); *United States* v. *Ball*, 163 U.S. 662 (1896).

It is now fundamental that the Fourteenth Amendment imposes on the States the standards of the Double Jeopardy clause of the Fifth Amendment. *Benton* v. *Maryland*, 395 U.S. 784, 795 (1969); *North Carolina* v. *Pearce*, *supra*; *Ashe* v. *Swenson*, 397 U.S. 436, 448 (Harlan J., concurring). Accordingly, no State may subject a man to "a second prosecution for the same offense after acquittal" and no State's standard for what constitutes the "same

offense" may constitutionally depart from the federal constitutional standard.[11]

This case calls upon the Court to define for conspiracy cases what constitutes the "same offense" when a State seeks to prosecute again "after acquittal." The need for such guidance from this Court derives not only from the widespread use of the conspiracy doctrine, but from the elusive contours of the offense itself. Perhaps the most frequently quoted expression of the problem presented by the conspiracy count is Mr. Justice Jackson's description of an "elastic, sprawling and pervasive offense . . . so vague that it almost defies definition." *Krulewitch* v. *United States*, 336 U.S. 440, 445-46 (1949). But this Court has not hesitated on other occasions to recognize and warn against the exploitation of that vagueness. "Prior cases in this Court have repeatedly warned that we will view with disfavor attempts to broaden the already pervasive and widesweeping nets of conspiracy prosecutions." *Grunewald* v. *United States*, 353 U.S. 391, 404 (1957) (Harlan, J.).

A hard-core example of an "attempt to broaden" the nets of conspiracy by exploiting the elastic and sprawling nature of the offense is the carving up of a single scheme, with multiple but identical objectives, into multiple agreements which can be tried

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[11] In *Benton*, this Court wrote:

> "Once it is decided that a particular Bill of Rights guarantee is 'fundamental to the American scheme of justice' . . . the same constitutional standards apply against both the State and Federal Governments." 395 U.S. at 795.

piecemeal until a conviction is obtained. Most importantly, that attempt to broaden the offense contravenes flagrantly the protection against double jeopardy for the "same offense."

Under existing federal definitions of the "same offense", the Double Jeopardy clause bars the carving up that took place here to yield a second conspiracy prosecution.

The guiding principle was enunciated by Mr. Justice Holmes:

> "When the plot contemplates bringing to pass a continuous result that will not continue without the continuous cooperation of the conspirators to keep it up, and there is such continuous cooperation, it is a perversion of natural thought and of natural language to call such continuous cooperation a cinematographic series of distinct conspiracies, rather than to call it a single one." *United States* v. *Kissel*, 218 U.S. 601, 607 (1910).

Federal courts have followed that principle by invoking the Double Jepardy clause to bar conviction for more than one conspiracy under a plan to obtain money from a given source even though the money was obtained from that source on different occasions, over a period of time, and by different conspirators using different means. *United States* v. *Palermo*, 410 F.2d 468, 470-71 (7th Cir. 1969). The test is not whether several substantive offenses are commited, but whether the conspiring parties entertain "a common, continuing objective." *United States* v. *H.E.*

Koontz Creamery, 257 F. Supp. 295, 305 (D.Md. 1966). If the parties have such a common continuing objective, "there is a single offense, despite the existence of diverse ways and means used to accomplish it." *United States* v. *Amerian Honda Motor Company*, 271 F. Supp. 979, 983 (N.D. Calif. 1967). And the Double Jeopardy clause prohibits the artifical characterization of a "new conspiracy" behind each criminal event.

Consistent with this test, federal courts have refused to find a "new conspiracy" simply because other conspirators have been added. *United States* v. *H. E. Koontz Creamery, Inc.*, 257 F. Supp. 295 (D.Md. 1966); *Short* v. *United States*, 91 F.2d 614 (4th Cir. 1937); or because additional substantive offenses have been committed over time, *United States* v. *Palermo, supra; United States* v. *Manton*, 107 F.2d 834, (2d Cir. 1939); *United States V. Mazzochi*, 75 F.2d 497 (2d Cir. 1935).

In a related context, the federal courts have refused to find prejudicial variance from an allegation of one conspiracy so long as one continuing objective is thematic. In *United States* v. *Hutul*, 416 F.2d 607 (7th Cir. 1969), the court found one conspiracy where defendants were engaged in a scheme to file false accident claims much like the scheme alleged here. Hutul was the hub of the conspiracy which had as its objective the fraudulent presentation of claims arising from six accidents. No codefendants participated in all six presentations, diferent insurance companies were defrauded, and ma-

terially different techniques were utilized to substantiate different claims. Yet, the common continuing objective required the finding of one conspiracy. In other words, if, as here, one of the Hutul claims had been isolated and held back to form the basis of a subsequent conspiracy prosecution, the protection of the Double Jeopardy clause would have barred the second conspiracy trial.

It is vital to observe in this connection that recognition of the "continuing objective" test does not bar multiple prosecutions for the *substantive offenses* committed in pursuance of the single conspiracy. This test thus does not invoke the "same transaction" theory rejected by this Court in *Ashe* v. *Swenson*, *supra*. The prosecution may try the substantive crimes arising from one conspiracy in separate proceedings. But it may not isolate each such crime as the inferential basis for a series of conspiracy prosecutions built upon the artificial theory that each such criminal event was preceded by a new conspiratorial agreement.

The "continuing objective" criterion for defining "the same [conspiracy] offense" was plainly ignored by the courts below. It could not be more evident that all four insurance claims, engineered by the same "hub" figure, to defraud the same insurance company by substantially the same device, arose as part of a single plan. The "Taylor conspiracy," prosecuted successfully here, differed from the three prior incidents, cleared by the prior jury, in only one respect: two sets of claimants were fabricated by Cortese and

thus two lawyer-doctor chains were required. Indeed, in terms of timing, the Taylor claim was processed in the midst of the other three, a factor highlighted under federal standards as relevant to a "single conspiracy" determination for double jeopardy purposes. *Short* v. *United States*, 91 F.2d 614, 620 (4th Cir. 1937).

Moreover, the State itself relied upon the tight similarity of the four events at trial. It made a prodigious effort to convince both court and jury that a criminal apparatus, working "just like clockwork" (T-10,380), had been constructed prior to the Taylor claim for use at any time to defraud the Maryland Casualty Company. The State claimed that this apparatus had been used to file the Mozzocca, Lewis and Vesper claims and that the striking similarity of those claims to this one provided a basis for the admission of evidence as to the former claims in this case. (T-3854-4, 3831-4, 8287-7, 8302-1).

Passing whether evidence of those claims, as to which Mulvaney had been acquitted, was constitutionally admitted here, see pp. 18-19 *infra*, it is surely strong evidence that even the State really regarded all four claims as having been filed pursuant to one continuing conspiratorial objective.

B. To Define "Harassment By Multiple Prosecutions" Under The Due Process Clause of the Fourteenth Amendment

Entirely apart from double jeopardy standards, the course of conduct of the State of New Jersey contituted harassment in violation of the Due Process

Clause of the Fourteenth Amendment. In September 1969, while petitioner Mulvaney awaited his first trial on three conspiracy and three substantive counts, indictments were returned against Perwin and Yormark charging them with substantive crimes in connection with the "Taylor claim." [12] Mulvaney was not charged. Soon, however, the Taylor claim became the basis for the indictment from which the instant case arose. The two substantive indictments were consolidated with the present indictment charging Yormark, Perwin, Mulvaney and Brizard with the "Taylor conspiracy." [13] This indictment was issued only after all the evidence in petitioner Mulvaney's first false claims trial had been introduced.

Under these circumstances, it is difficult to avoid the conclusion that, for some time prior to Mulvaney's first trial, the State was fully aware of every material fact later presented to the grand jury to obtain his second indictment. The "Taylor conspiracy" overlapped in time with the Mozzocca and Lewis episodes. Cortese was admittedly the hub of all alleged conspiracies. It is inconceivable that in preparing Cortese for the first trial, or in obtaining with his help, the two substantive indictments against Perwin and Yormark, the State did not learn of his allegation against Mulvaney in the "Taylor conspiracy." Yet the State did not charge Mulvaney with the Taylor conspiracy until it had heard the weakness of its first case against him. This delaying tactic

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[12] Indictment Nos. 1194-69, 1195-59.

[13] Mulvaney remained unnamed in any substantive counts.

thus neatly precluded petitioner from requesting consolidation of the Taylor charge with the three other charges then on trial.

Apart from the Double Jeopardy provision of the Fifth Amendment, this Court has acknowledged that successive indictments for separate offenses arising out of the same criminal course of conduct may constitute harassment in violation of the Due Process provision of the Fourteenth Amendment. *Hoag* v. *New Jersey*, 356 U.S. 464, 467 (1958); see also *Ciucci* v. *Illinois*, 356 U.S. 571 (1958); *United States* v. *American Honda Motor Company*, 271 F. Supp. 979 (N.D. Calif. 1967).

Assuming *arguendo* that the Vesper, Mozzocca, Lewis and Taylor claims did arise out of four distinct conspiratorial agreements, the State's "holding back" of the Taylor conspiracy, when it plainly was prepared to litigate it, supports the inference of harassment by multiple trials. As in *Hoag* v. *New Jersey*:

> "[E]ven if it was constitutionally permissable for New Jersey to *punish* petitioner for each of the four robberies as separate offenses, it does not necessarily follow that the State was free to prosecute him for each robbery at a different trial. The question is whether this case involved an attempt 'to wear the accused out by a multitude of cases with accumulated trials.' *Palko* v. *Connecticut*, 302 U.S. 319, 328 (1937)." *Hoag* v. *New Jersey*, *supra*, at 467.

It is not that all crimes arising out of the same transaction must be consolidated at a single trial. Neither

is it that multiple punishments cannot be administered for multiple offenses arising out of a criminal transaction. Petitioner contends only that, in some circumstances, the "holding back" of charges serves no purpose other than harassment in derogation of Due Process. This Court should take this gross instance of that tactic to so hold.

C. To Implement The Principles Enunciated In Ashe v. Swenson

The principles of collaterial estoppel, integral to the Double Jeopardy prohibition, bar a state from relitigating an issue of "ultimate fact" once that issue has been determined. *Ashe* v. *Swenson*, 397 U.S. 436 (1970). In *Ashe*, this Court emphatically rejected a "hypertechnical and archaic approach" to the collateral estoppel rule and declared that "realism and rationality" must be employed in analyzing the factual conclusions which inhere in a jury's general verdict. *Id*, at 444.

The jury's verdict in Dr. Mulvaney's first trial was predicated on a finding that Dr. Mulvaney's participation in Cortese's program was innocent. At that trial it was undisputed that the Vesper, Mozzocca and Lewis claims were fictitious. The State alleged that Dr. Mulvaney had knowingly prepared fraudulent medical bills to support each of them. Dr. Mulvaney's defense was that his participation was innocent, that he had been an unwitting instrumentality of Cortese's fradulent scheme. He contended that in preparing the medical bills he had relied upon his office records, reflecting consultation with indi-

viduals who had represented themselves as accident victims. If these victims and accidents were fabricated, he was not aware of it. Furthermore, if his records were inaccurate they were inadvertently so, under the pressure of a heavy medical practice.

Under these circumstances, the only possible interpretation of the jury's acquittal is that the State had failed to prove a fraudulent intent and that Mulvaney had been an unwitting dupe.

Yet, in disregard of the prior verdict, the State introduced evidence of Dr. Mulvaney's participation in the Vesper, Lewis and Mozzocca claims to demonstrate here that he had not been duped again in preparing the Taylor medical bills. Thus, Dr. Mulvaney was substantially in the position of the petitioner in *Ashe* v. *Swenson*, *supra*. Having been exonerated by a jury of any misconduct in connection with the Vesper, Lewis and Mozzocca claims he was again put to the task of proving that his participation was innocent.[14] To implement *Ashe*, this Court should not tolerate any deviation from its protective principles.

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[14] In addition to the Vesper, Lewis and Mozzocca claims, other claims were introduced to show that Mulvaney entertained fraudulent intent when he prepared the Taylor medical bills. The State asserted that the medical records of Holder, Antico, DiBello and Jones had been falsified in connection with claims on which Perwin and Mulvaney had collaborated. Dr. Mulvaney was cross-examined extensively in regard to his treatment of Holder (T-3854-4) and DiBello (T-3831-4) and they (T-8282-7, 8302-1) testified in rebuttal.

Was a third conspiracy prosecution in the offing if this one, like the first, had yielded an acquittal? See Question Presented No. 2, pp. 15-17 *supra*.

D. To Determine Whether, In Conspiracy Cases, A Joint Trial Conducted In Violation Of Double Jeopardy Principles Denies Due Process To A Joined Defendant

After petitioner Mulvaney and co-defendant Perwin were acquitted at the first trial, on a finding that neither of them had knowingly participated in the conspiracy charged, they were retried, for the same conspiracy, this time with petitioner Yormark named as a co-conspirator.

At the second trial, the jury was instructed that the declarations and acts of each named co-conspirator, could be weighed in assessing the guilt of every co-conspirator. (T-10,437 to 10,438, 10,441-10). In some substantial degree, the conviction of Yormark was thus predicated upon evidence against Perwin and Mulvaney.

But this evidence was admitted in violation of principles of *Ashe* v. *Swenson*, *supra*. Indeed, the State should have been barred altogether from subjecting Mulvaney and Perwin to a second trial for the same offense. Yet, despite these two defects of constitutional proportion, which should have precluded evidence as to Perwin and Mulvaney, their allegedly culpable declarations and acts were admitted, *not only against them*, but against Yormark, on the theory that all three were conspirators.

Under this Court's cases, a conviction so contaminated, should not be allowed to stand. *McDonald* v. *United States*, 335 U.S. 451 (1948); *Anderson* v. *United States*, 318 U.S. 350 (1943).

III. CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted as to petitioner Mulvaney on Questions 1-3 and as to petitioner Yormark on Question 4.

Respectfully submitted,

WILLIAMS, CONNOLLY & CALIFANO

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April 12, 1972

APPENDIX A

SUPREME COURT OF NEW JERSEY

C-233 September Term 1971

STATE OF NEW JERSEY,
Plaintiff-Respondent,

vs.

DR. ROBERT B. J. MULVANEY,
Defendant-Petitioner.

To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon Ordered that the petition for certification is denied except as to costs as to which further briefs must be filed and exchanged within 30 days. No stay is allowed as to balance of judgment.

WITNESS, the Honorable Joseph Weintraub, Chief Justice, at Trenton on the 1st day of February, 1972.

/s/ [Illegible]
Acting Clerk

SUPREME COURT OF NEW JERSEY

C-224 September Term 1971

STATE OF NEW JERSEY,
Plaintiff-Respondent,

vs.

MILTON YORMARK,
Defendant-Petitioner.

ON PETITION FOR CERTIFICATION

To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon Ordered that the petition for certification is denied, with costs.

WITNESS the Honorable Joseph Weintraub, Chief Justice, at Trenton on the 1st day of February, 1972.

/s/ [Illegible]
Acting Clerk of
the Supreme Court

Not For Publication Without The
Approval Of The Committee On Opinions

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

A-1192-70

STATE OF NEW JERSEY
Plaintiff-Respondent,

v.

MILTON YORMARK,
Defendant-Appellant.

A-1309-70

STATE OF NEW JERSEY
Plaintiff-Respondent,

v.

STANLEY PERWIN,
Defendant-Appellant.

A-1386-70

STATE OF NEW JERSEY
Plaintiff-Respondent,

v.

ROBERT B. J. MULVANEY,
Defendant-Appellant.

A-1184-70

STATE OF NEW JERSEY
Plaintiff-Respondent,

v.

J. L. BRIZARD,
Defendant-Appellant.

Argued September 13, 1971 and October 5, 1971

Decided Nov. 30, 1971

Before Judges Goldmann, Collester and Mintz

On appeal from the Essex County Court

Mr. Raymond A. Brown argued the cause for appellant Milton Yormark (Mr. Irving I. Vogelman on the brief; Messrs. Brown, Vogelman, Morris & Ashley, attorneys).

Mr. Arthur J. Timins argued the cause for appellant Stanley Perwin (Messrs. Grinchis & Timins, attorneys).

Mr. Richard S. Lehrich argued the cause for appellant Robert B. J. Mulvaney (Mr. Matthew P. Boylan of counsel; Messrs. Lowenstein, Sandler, Brochin, Kohl & Fisher, attorneys).

Mr. George P. Helfrich, argued the cause for appellant J. L. Brizard (Messrs. Helfrich & Gallagher and Mr. George R. Sommer, attorneys).

Mr. David S. Baime and Mr. Alan Silber, Assistant Prosecutors, argued the cause for respondent (Mr. R. Benjamin Cohen, Assistant Prosecutor, on the brief; Mr. Joseph P. Lordi, County Prosecutor, attorney).

The opinion of the court was delivered by COLLESTER, J. A. D.

OPINION

The four defendants appeal from their respective convictions, following a jury trial, of conspiracy to obtain money under false pretenses from the Maryland Casualty Company, in violation of *N.J.S.A.* 2A:98-1. Yormark and Perwin also appeal from their convictions on three-count indictments charging them individually with obtaining money under false pretenses from the Maryland Casualty Company, in violation of *N.J.S.A.* 2A:111-1. All of the indictments were consolidated for the purpose of trial.

Following the convictions Yormark, Perwin and Mulvaney were each sentenced on the conspiracy indictment to penitentiary terms of 18 months, 12 months in custody and 6 months on probation, and fined $1,000. Brizard was sentenced to a penitentiary term of 18 months, 6 months in custody and 12 months on probation, and fined $1,000. Yormark was sentenced on the three-count indictment for obtaining money under false pretenses, as follows: on the first count to a penitentiary term of 18 months, 12 months in custody and 6 months on probation, to be served consecutive to the sentence imposed on the conspiracy indictment, and fined $1,000; on the second count to a concurrent penitentiary term of 18 months, 12 months in custody and 6 months on probation, and fined $1,000; and on the third count to a concurrent penitentiary term of 18 months, which was suspended, probation for 18 months imposed, and a $1,000 fine levied. Perwin was sentenced on the three-count indictment for obtaining money under false pretenses, as follows: on the first count to a penitentiary term of 18 months, 12 months in custody and 6 months

on probation, to be served consecutive to the sentence imposed on the conspiracy indictment, and fined $1,000; and on each of the second and third counts to a concurrent penitentiary term of 18 months, 12 months in custody and 6 months on probation, and to pay a fine of $1,000. In addition to the above sentences Yormark, Mulvaney and Brizard were each ordered to pay $16,750, representing one-quarter of the costs of prosecution.

The conspiracy indictment charged that Yormark and Perwin, attorneys of this State, Mulvaney and Brizard, physicians of this State, and Vincent Morelli and Albert Albrizio conspired with Anthony Cortese, a claims supervisor of the Maryland Casualty Company, to obtain money under false pretenses from the insurance company. Cortese, although named as a co-conspirator, was not included as a defendant in the indictment. Morelli and Albrizio were severed from the indictment at the outset of the trial. Cortese and Morelli testified on behalf of the State.

The trial extended over a period of four months. The State's proof revealed that in May or June 1967 Morelli, whose wife's automobile was insured by the Maryland Casualty Company, together with Leo Jeronowitz, the owner of an automobile body repair shop, and Cortese initiated a plan to defraud the insurance company. Jeronowitz was prevented from thereafter playing an active role in the conspiracy because of a serious illness which proved fatal on September 22, 1967.

The plan agreed upon was that Morelli would report a fictitious automobile accident to his wife's insurance carrier, admitting that he had caused the accident while driving his wife's car, with resulting property damage and personal injuries sustained by

fictitious occupants of the other vehicle. Cortese would arrange for payment of the fraudulent claims submitted.

In August 1967 Morelli and Cortese decided to put their plan into operation. It was agreed that the six bogus claimants should be represented by two different attorneys in order to make the case look more legitimate. Cortese said he would get Perwin to act as one of the attorneys; Morelli was to secure the other. Morelli concocted the following names for the claimants: Joseph Taylor as the owner and operator of the other car, and Frank Taylor, Charles Taylor, John McBride, Sr., John McBride, Jr. and Phillip Allison as the passengers.

Thereafter Cortese telephoned Perwin and arranged for him to represent the three Taylors in their claims against the company which he, Cortese, would personally supervise. Perwin agreed to secure medical bills of about $200 for each of the Taylors and to send a letter to Mrs. Morelli stating that he represented them. Perwin subsequently sent the letter and notified Cortese that Dr. Mulvaney was the "treating physician."

Meanwhile, Morelli asked one Hy Chuven to get a lawyer to handle a "phony" accident case. That evening, or the next, Morelli received a telephone call from Yormark, who said he was a friend of Chuven's. Morelli told Yormark he wanted him to represent three of six claimants in a bogus accident case; that the insurance carrier was the Maryland Casualty Company; that Cortese would handle the claims, and that the "accident" had not yet happened because they had not decided "where it would be." Morelli informed Yormark that he would have to provide the necessary doctor's bills. Yormark agreed to handle

the claims, said he knew Cortese and would work it out with him, and asked Morelli to have Cortese call him. Morelli reported the conversation to Cortese, who telephoned Yormark and confirmed the arrangement. Yormark agreed to obtain medical bills for each bogus claimant in approximate amounts of $200. It was not until several weeks later that Cortese supplied Yormark with the names and addresses of his fictitious clients and told him to send a letter of representation to Morelli. Yormark then told Cortese that Dr. Brizard would be the treating physician.

With the preliminary part of the plan completed, Morelli on August 18, 1967 reported to the insurance company that while driving his wife's automobile on the previous day he had collided with another motor vehicle on the J Street ramp of the Manhattan Bridge in New York City. He gave the names and addresses of the fictitious occupants of the other car.

The property damage claim for the Taylor car was paid by an insurance company check issued by Cortese in the amount of $3,400 payable to "Joseph Taylor." The check was given to Morelli, who cashed it through Albert Albrizio. The proceeds were shared by Morelli and Cortese.

After Yormark sent his letter of representation to Morelli and notified Cortese that Dr. Brizard would be the treating physician, Cortese told Morelli to arrange to have three persons go to Brizard's office. Morelli, his brother Peter, and a third person, posing as the McBrides and Allison, went to the doctor's office. They told Brizard they had been sent by Yormark. There was no medical examination: Brizard merely wrote down some information and said he would sent reports to Yormark. Cortese subsequently received from Yormark Dr. Brizard's medical bills

for the claimants, each in the approximate amount of $200. Thereafter Cortese arranged for Morelli to have the same impostors, posing as the McBrides and Allison, examined by Dr. Jack Siegal for the insurance company. A similar arrangement was made for them, posing as the Taylors, to be examined by Dr. S. Wolfe Emmer for the company. While Morelli and his cohorts fooled Dr. Siegal completely, Dr. Emmer sent a confidential letter to Cortese reporting that he did not believe the three men he had examined. Cortese immediately destroyed the letter.

In November 1967 Cortese called Yormark and advised him of the payments that would be made to settle the McBride and Allison claims. There were no negotiations; Yormark accepted the figures. Cortese had Yormark prepare releases in blank for each claimant. The releases and Brizard's medical bills were sent to Cortese. Cortese gave the releases and insurance company drafts, made payable to Yormark and his clients, to Morelli, who arranged to have the signatures of the claimants forged and the releases notarized. After Morelli returned the documents Cortese met Yormark at the latter's office and gave him the checks. Yormark endorsed and deposited them in his trustee account. After deducting his fee for each case Yormark issued checks payable to his fictitious clients and gave them to Cortese. Cortese turned them over to Morelli, who had the names of the McBrides and Allison forged and deposited them in a savings and loan account opened for that purpose. The funds were later withdrawn and divided by Morelli and Cortese.

The same procedure was substantially followed in the settlement of the Taylor claims with Perwin. There were no negotiations. Cortese fixed the amount

for each claim; Perwin submitted the releases drawn in blank, together with Dr. Mulvaney's bills for the three claimants. Cortese issued company checks for each claim, payable to Perwin and the claimant, and turned them over, together with the releases, to Morelli. Morelli had the Taylor names forged thereon and the releases notarized. Cortese then took the checks to Perwin's office and received in return checks drawn on Perwin's office trust account payable to each of the Taylors, less Perwin's fees. Cortese turned these checks over to Morelli, who had them forged and cashed. The proceeds were shared by Morelli and Cortese. Perwin gave a check in the amount of $300 to Dr. Mulvaney instead of the charges, totaling $685, which appeared on his bills.

Defendants denied the charges in the indictments. Yormark testified that on September 27, 1967 the two McBrides came to his office and arranged that he represent them and Phillip Allison in their personal injury claims arising out of an automobile accident which occurred on August 17. They said they were passengers in a car operated by Morelli and had been treated by Dr. Brizard. The case was settled following negotiations with Cortese on November 24, 1967, and releases for the three men were sent to McBride, Sr. at his place of business with instructions that they be signed and notarized. When the releases were returned Yormark sent them, together with Brizard's medical bills to the insurance company. Yormark said that upon receipt of the insurance company checks he delivered over checks, less his fees, to the McBrides and Allison at his office. He denied having even talked to Morelli and said that prior to negotiating the settlement he had never talked to Cortese about the case. He also denied that the McBrides and Allison were sent to him by

Chuven and claimed he had never heard of the Taylors.

Defendant Perwin claimed that he had been duped by Cortese. He testified that his first knowledge of the Taylor claims was on August 25, 1967 when Cortese telephoned that he had a case for him. Cortese gave him the names of the Taylors and said they were friends of his. As a result he wrote a letter of representation to Mrs. Morelli. He testified that Cortese told him the Taylors were being treated by Dr. Mulvaney. He admitted that he never met the Taylors and was never informed of the extent of their alleged injuries. He later received Dr. Mulvaney's bills and negotiated a settlement of the claims with Cortese. He prepared the releases and sent them to Cortese to be executed by the Taylors, together with the medical bills. Cortese thereafter brought the company checks in payment of the claims to his office. The checks were deposited in a trust account and checks, made payable to the Taylors less his fees, were delivered to Cortese. He denied ever talking to Dr. Mulvaney about the claims and said he had no knowledge that Yormark represented other persons allegedly injured in the accident.

Dr. Mulvaney testified that he had no independent recollection of having treated the Taylors. He relied upon his office records, which indicated that the Taylors had first come to him for treatment on August 18, 1967 and that he had treated them thereafter. He verified the bills submitted by Perwin as his and admitted that Perwin had paid him $300, which was less than the amount of his bills. Mulvaney testified that he had not known Morelli or Dr. Brizard before the trial.

Dr. Brizard testified that he had examined and treated the McBrides and Allison but could not produce his records which, he said, had been lost or destroyed. He sent Yormark a bill for treatments rendered, but could not recall whether he had been paid. Brizard said that the only person he knew previous to the trial was Yormark.

I

Defendants claim they were unfairly prejudiced by their misjoinder in the indictment charging a single conspiracy and the trial court's refusal to grant motions for severance made during the course of the trial. They argue that the evidence, at best, disclosed at least two separate unconnected conspiracies: (1) Cortese, Perwin and Mulvaney; (2) Morelli, Cortese, Yormark and Brizard, and probably more, and not a single overall conspiracy as charged by the State. They contend that the improper joinder subjected each to "spill-over" prejudice and transference of guilt which emanated from evidence relating to the activities of the other defendants. They argue that the evidence failed to connect Yormark with Brizard and Perwin with Mulvaney, and that there was no proof that each defendant knew the other three.

Defendants rely primarily on *Kotteakos* v. *United States*, 328 *U.S.* 750 (1946), where the Supreme Court reversed the convictions of several defendants on the ground that a material variance between the charge of one conspiracy in the indictment and proof of eight or more separate conspiracies at the trial was prejudicial. We conclude that *Kotteakos*, and other cases cited by defendants, concerning prejudice resulting from the trial of an indictment for one conspiracy where there were in fact multiple conspira-

cies, are factually distinguishable from the instant case and not applicable.

An agreement or combination between two or more persons to commit a crime constitutes an unlawful conspiracy if there has been an overt act in furtherance of the agreement or combination. *State* v. *Dennis*, 43 *N.J.* 418, 423 (1964). The gist of the offense is the criminal agreement, *State* v. *La Fera*, 35 *N.J.* 75, 86 (1961), which may be established by inferences drawn from the circumstances, *State* v. *Carbone*, 10 *N.J.* 329, 341-342 (1952). It must be shown that each defendant entered into the agreement with one or more persons, whether charged with him in the indictment or not, and whether known or unknown. It is not essential that there be direct contact between the parties, or that all enter into the conspiratorial agreement at one and the same time. It may be that they have never seen each other or heard the name of the other, and yet by law they may be parties to the same common criminal agreement. *Id.* at 337-338. Thus, proof of the least degree of concert of action between the parties is sufficient to establish the existence of a conspiracy. See also *State* v. *Hutchins*, 43 *N.J.* 85, 91-93 (1964), and *cf.* *State* v. *Burgess*, 97 *N.J.Super.* 428, 432-434 (App. Div. 1967).

From our review of the record we are satisfied that there was only one conspiracy—an unlawful combination to obtain money under false pretenses from the Maryland Casualty Company by concocting a fictitious automobile accident and submitting false damage claims for bogus claimants. The conspiracy was initiated by Morelli and Cortese, who brought Yormark and Perwin into the conspiracy to submit fraudulent claims to the company and who, in turn, ar-

ranged for Dr. Mulvaney and Dr. Brizard to prepare false medical reports and bills for the bogus claimants. We conclude that there was ample direct and circumstantial evidence to support the State's charge that defendants were involved in a single overall conspiracy. The record clearly discloses that each of the four defendants played his separate role in the execution of the common criminal scheme. While each was to obtain a share of the proceeds of the fraud, separate and apart from that obtained by the others, this division of the spoils depended upon the accomplishment of the common objective.

It is also argued that defendants were prejudiced by a single trial of offenses which were in no way connected, *i.e.*, the substantive charges against Yormark and Perwin. The consolidation of the trial of a conspiracy indictment with the substantive offense is generally proper, *State* v. *Cormier*, 46 *N.J.* 494, 504 (1966), and our rules permit the joinder of offenses charged against each defendant if they are of the same or similar character and also are based on two or more acts or transactions connected together or constituting parts of a common scheme or plan. *R.* 3:7-6. The rules also provide for the joinder of defendants if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. *R.* 3:7-7.

The granting of a motion for severance is discretionary with the trial court. *R.* 3:15-2. The rule is declaratory of the long-settled practice in this State. *State* v. *Rios*, 17 *N.J.* 572, 584 (1955). Denial of such a motion will not result in a reversal unless it is clearly shown that the trial court's action consti-

tuted an abuse of the court's discretion. See *State* v. *Sinclair*, 49 *N.J.* 525, 550 (1967), and *State* v. *Manney*, 26 *N.J.* 362, 368 (1958). Here the conspiracy and the substantive offenses charged against Yormark and Perwin all arose out of the same criminal transaction. The trial court repeatedly instructed the jurors to give their separate consideration as to whether each particular defendant was guilty of the crimes charged against him, and to consider each piece of evidence only as it related to the particular defendant to whom they found it applicable. We have no cause to believe that the jury did not comply with the trial court's instructions.

We are satisfied that there was neither a prejudicial misjoinder nor a variance between the indictment charging a single conspiracy and the proofs adduced at the trial, and that there was no error in the denial of motions for severance.

II

Defendants Perwin and Mulvaney charge that the trial court erred in denying their pretrial motions to dismiss the conspiracy indictment on the ground of double jeopardy and collateral estoppel.

Their claim is bottomed on their prior acquittals following the trial of a six-count indictment. Three counts charged these defendants with separate offenses of obtaining money by false pretenses from the Maryland Casualty Company based on nonexistent accidents (*N.J.S.A.* 2A:111-1), and three counts charged them with separate conspiracies to commit such crimes (*N.J.S.A.* 2A:98-1). More specifically, the three counts charging the substantive crimes alleged that the insurance company, based on the false

representations of these defendants, paid the following bogus claims: (1) $2,050 to Joseph Vesper for injuries allegedly sustained in an accident on October 15, 1966; (2) $2,175 to Willie Lewis for injuries allegedly sustained in an accident in March 1967, and (3) $2,150 to Joseph Mozzocca for injuries allegedly sustained in an accident on April 19, 1967.

Perwin and Mulvaney allege that the essence of the conspiracies charged in the prior trial was that they conspired to defraud the insurance company over the period from September 15, 1966 to February 16, 1968, while the conspiracy charged in the present indictment allegedly occurred between August 1, 1967 and February 2, 1968 within the same time period. They argue that the State impermissibly carved an alleged single, continuous conspiracy into four separate conspiracies and that since they were acquitted of the three conspiracies charged in the prior trial the State was barred under the principles of double jeopardy and collateral estoppel from prosecuting the conspiracy charged in the present indictment.

The constitutional guarantee of double jeopardy bars the State from subjecting a defendant to the hazards of a trial and possible conviction more than once for the same alleged offense. *State* v. *Farmer*, 48 *N.J.* 145, 167 (1967), *cert. den.* 386 *U.S.* 991 (1967). The rule of collateral estoppel directs that once an issue of ultimate fact has been litigated and determined by a valid and final judgment, the issue cannot again be relitigated in a subsequent proceeding between the same parties. *State* v. *Cormier*, 46 *N.J.* 494, 505 (1966).

Tested by these rules we are satisfied that neither double jeopardy nor collateral estoppel is involved in

this case. *Ashe* v. *Swenson*, 397 *U.S.* 476 (1970); *State* v. *Ferrante*, 111 *N.J.Super.* 299 (App. Div. 1970), and other cases relied upon by defendants are factually inapposite.

The agreements underlying the three conspiracies charged in the former trial were separate, distinct and different from that charged in the instant case. There was no evidence that the four agreements were tied together as stages in the formation of one larger, all-inclusive combination directed to achieving a single unlawful end result. On the contrary, each separate agreement had its own distinct illegal end—each goal was an end in itself, separate from the others. In fact, it is undenied that defendants never claimed during the prior trial that the three conspiracies charged in that indictment comprised one single conspiracy. The parties involved in the four conspiracies were different, the fictitious accidents alleged to have taken place in the prior indictment occurred prior to that charged in the instant case, and the "Taylor" conspiracy was never an ultimate fact for determination by the jury in the previous trial. There was no double jeopardy or collateral estoppel to bar the prosecution of the indictment in this case.

III

Perwin, Mulvaney and Yormark allege that the court committed reversible error by permitting the State to introduce in evidence irrelevant and prejudicial collateral matters. The testimony, which was adduced on cross-examination of defendants and on rebuttal, related primarily to other transactions of defendants with Cortese and the Maryland Casualty Company, the close relationship between Perwin and Dr. Mulvaney, and a similar relationship between

Yormark and Dr. Brizard. We think it appropriate to refer to some of the testimony which defendants claim was prejudicial.

Perwin was cross-examined concerning the settlement of other cases with the insurance company that had been referred to him by Cortese. He admitted he never saw the claimants in six cases and that Cortese "controlled" the claims for the company. Included were the claims of Vesper, Lewis and Mozzocca that were involved in the prior trial for conspiracy in which Perwin and Mulvaney had been acquitted. In all six cases above referred to, with the exception of the Mozzocca claim, Mulvaney was the treating physician, and while his medical bill in each case exceeded $200 the doctor accepted flat fees of $100 from Perwin.

One case involved a claim by Zeno and Frances DiBella for injuries allegedly received in an accident while passengers in an automobile operated by Steven Churlen. The treating physician was Mulvaney, who submitted bills for $250 and $150; respectively, and was paid a total of $200 by Perwin. Mulvaney testified on cross-examination that he had treated the DiBellas. The insurance company settled the claim with Perwin for $1,500 and issued checks payable jointly to Perwin and the DiBellas. Mrs. DiBella, called by the State in rebuttal, testified that neither she nor her husband were injured in the accident, had never filed a claim for damages or retained Perwin as their attorney, were never examined or treated by Mulvaney, and had received no money from the insurance company.

In another case Rose Holder, who was injured in an accident, was sent by her attorney (not Perwin)

to be examined by Mulvaney. Mulvaney's medical report and his bill for $600, which were forwarded to the insurance company, indicated Mrs. Holder had sustained a serious back injury, that he had treated her on approximately 45 occasions which included injections and physiotherapy, and had provided her with a lumbosacral belt. On rebuttal Mrs. Holder testified she saw Mulvaney on only one occasion when she was examined by the doctor. She said she had never been treated by Mulvaney and denied receiving any injections or a lumbosacral belt.

Dr. Mulvaney was also cross-examined regarding treatment he gave to Anthony Antico and his infant son Michael for injuries received in a fall and whose claims were settled by the insurance company. Mulvaney's records indicated that Anthony was treated on 16 occasions for injuries to the neck, arm and hip, for which the doctor charged $168. Michael was treated five times and the bill for services was $145. In rebuttal Anthony Antico testified that neither he nor his child was injured in an accident and that he, together with Morelli and Cortese, defrauded the company with the bogus claim. Anthony said he had never been treated by Mulvaney and, in fact, had never met him before the trial.

Yormark was cross-examined about other cases against the insurance company where he represented the claimant and Brizard was the treating physician. One such case involved the settlement of a personal claim by Yormark for injuries he said he sustained in an automobile collision while driving a car. Brizard was his treating physician and submitted a bill for medical services. On rebuttal, Patricia Vroman testified that she was involved in the collision but that Yormark was not the driver of the other vehicle.

Defendants advance three reasons in support of their argument that such testimony was erroneously admitted in evidence. They claim it should have been excluded under *Evidence Rule* 55, which renders inadmissible evidence of other crimes or civil wrongs to show the disposition of the accused to commit the crime charged; that collateral matters adduced by the State on cross-examination may not be contradicted by extrinsic evidence on rebuttal, and that testimony concerning the Vesper, Lewis and Mozzocca claims was inadmissible because Mulvaney and Perwin had previously been acquitted of criminal conduct involving those claims.

Defendants' reliance on *Evidence Rule* 55 is misplaced. The rule contains an explicit exception which states that "such evidence is admissible to prove some other fact in issue including motive, intent, plan, knowledge, identity, or absence of mistake or accident." This exception was followed by our courts long before *Evidence Rule* 55 was adopted. See *State* v. *Sinnott*, 24 *N.J.* 408, 413 (1957); *State* v. *Homer*, 86 *N.J.Super.* 351, 364 (App. Div. 1965). So, too, proof of other instances of misconduct which disclose a working relationship between the parties and a common course of dealing leading up to the crime is admissible. *State* v. *Attanasio*, 92 *N.J.Super.* 267, 269-270 (App. Div. 1966), certif. den. 48 *N.J.* 354 (1966); *State* v. *Harris*, 105 *N.J.Super.* 319, 322-323 (App. Div. 1969). In our opinion the testimony here complained of was relevant to show knowledge by defendants that the Taylor, McBride and Allison claims were fictitious; the existence of a common scheme or plan to defraud the insurance company, as shown by their prior relationships and course of dealing with each other, and motive and intent to commit

the fraud; as well as to expose the falsity of Mulvaney's medical records.

As to defendants' argument that collateral matters developed on cross-examination could not be rebutted by the State, the short answer is that rebuttal testimony can be introduced if it is relevant and would be independently admissible upon a substantive issue in the case. *State* v. *Mathis*, 47 *N.J.* 455, 471 (1966); *State* v. *Schuler*, 28 *N.J.Super.* 275, 277 (App. Div. 1953).

We find no error in the admission of evidence concerning the Vesper, Lewis and Mozzocca claims. The fact that Mulvaney and Perwin had been previously tried and acquitted of other offenses involving such claims does not bar the introduction of evidence with respect to such matters where it is offered for the purpose of showing guilty knowledge, a corrupt intent, and involvement by the defendants in a common scheme or plan to defraud the insurance company in this case. See *State* v. *Robinson*, 16 *N.J.L.* 507, 509 (Sup. Ct. 1838). The admission of such testimony, although it relates to other alleged offenses for which the defendants had been previously acquitted, is upheld by the great weight of authority throughout the country. See *Hodges* v. *State*, 85 *Ga. App.* 617, 70 *S. E.* 2d 48, 50 (Ct. App. 1952), *cert. den.* 209 *Ga.* 283, 71 *S. E.* 2d 543 (Sup. Ct. 1952), *cert. den.* 344 *U.S.* 903 (1952); *People* v. *Johnston*, 328 *Mich.* 213, 43 *N.W.* 2d 334, 340 (Sup. Ct. 1950); *Robinson* v. *State*, 40 *Ala. App.* 101, 108 *So.* 2d 188 (Ct. App. 1959); *People* v. *Massey*, 196 *Cal. App.* 2d 230, 16 *Cal. Rptr.* 402, 405 (Ct. App. 1961); *Koenigstein* v. *State*, 101 *Neb.* 229, 162 *N.W.* 879, 882 (Sup. Ct. 1917); *Himmelfarb* v. *United States*, 175 *F.*2d 924, 941 (9 Cir. 1949), *cert. den.* 338 *U.S.* 860 (1949);

United States v. *Feinberg*, 383 *F.* 2d 60, 71 (2 Cir. 1967), *cert. den.* 389 *U.S.* 1044 (1968).

Defendants rely primarily on *State* v. *Bartell*, 15 *N.J.Super.* 450 (App. Div. 1951), which was affirmed by an evenly divided court thereby rendering any opinion by the court impossible. 10 *N.J.* 9 (1952). We conclude that *Bartell* is inapposite. The court there held, in a prosecution for procuring illegal registration of voters, cross-examination of defendant concerning registration of other unqualified voters, with respect to which defendant had already been exonerated of unlawful intent and the charges predicated thereon dismissed, was not relevant to the issues and could not be pursued as a matter of right, and further, that permitting such cross-examination for the purpose of testing the defendant's credibility on collateral subjects was erroneous where such proof at most could only generate a speculative inference that he had a propensity to commit the crime charged. However, it is noted that the court specifically excluded from its ruling all questions calculated to establish the criminal motive of the defendant.

We are satisfied that the challenged testimony in the instant case was relevant and properly admitted by the trial judge for the reasons we have previously expressed.

IV

We turn next to Dr. Mulvaney's claim that he was deprived of his Sixth Amendment right to the assistance of counsel. The claim is predicated upon the court's appointment of Dino Bliablias as Mulvaney's attorney when Frederic Ritger, his trial attorney, was hospitalized with a suspected heart attack during the tenth week of the trial. The record shows that on

November 16, 1970, Walter Van Riper advised the court that Ritger, his law partner, had suffered chest pains and been taken to a hospital. The trial court requested Van Riper to act temporarily for Mulvaney until the seriousness of Ritger's condition could be ascertained, and said that if Ritger would be unable to return, a decision would have to be made as to whether Van Riper would be required to review the transcript and continue the trial rather than declare a mistrial as to Mulvaney. Van Riper replied that he would be unable to do so because of the other trial commitments. On the following day Van Riper informed the court that Ritger was "suspected of having a coronary" and it would be ten days before the doctor could determine whether Ritger would be able to resume with the trial. Van Riper moved for a severance on behalf of Mulvaney which was opposed by the prosecutor who said that a state physician was then examining Ritger. The motion for a severance was denied.

On Wednesday, the next day, Ritger's physician expressed an opinion that Ritger suffered from a pulmonary embolism and would require hospitalization for three to five weeks. The prosecutor reported that the State's physician confirmed that Ritger's condition was serious and that the optimum time for recovery would be about two weeks. The prosecutor opposed granting a severance as to Mulvaney because ten weeks of trial had elapsed and suggested that Van Riper or some other attorney act for Mulvaney following a reasonable continuance for counsel to prepare his case. Van Riper iterated that he could not take over the case because of other commitments. At the end of the court session that day the trial court again denied the motion for a severance, ordered Mul-

vaney to engage new counsel, and stated that if he could not do so the court would assign counsel to represent him. Van Riper asked for a recess until the following Monday for this purpose but the court ruled that Mulvaney would have until noon the next day to engage counsel.

That evening Mulvaney conferred with Bliablias concerning his representation in the case. On the following day Van Riper, on behalf of Mulvaney, made an unsuccessful application to this court for a stay of the trial court's ruling. Mulvaney thereupon requested that he be granted more time to retain an attorney of his own choice. The trial judge denied the request, indicating his belief that Mulvaney was engaging in dilatory tactics and feigning inabilty to get a lawyer. The judge then appointed Bliablias to serve as Mulvaney's trial counsel. An 11-day recess was granted in order for Bliablias to familiarize himself with the case, which period was subsequently extended for an additional day. Thereafter Bliablias served as Mulvaney's trial counsel for the next seven weeks and to the conclusion of the trial.

Mulvaney argues that he (1) was not afforded a fair opportunity to secure counsel of his own choice, and (2) was denied the effective assistance of counsel. It is firmly established that one accused of crime has the right to the assistance of counsel for his defense, *Gideon* v. *Wainwright*, 372 *U.S.* 335 (1963), and also has the right to "a fair opportunity to secure counsel of his own choice." *Crooker* v. *California*, 357 *U.S.* 433, 439 (1958). However, the right to choose counsel of his own choice is not an absolute right; reasonable diligence in securing counsel is required. *State* v. *Longo*, 133 *N.J.L.* 301 (E. & A. 1945). An accused's right to select his own counsel

cannot be insisted upon in a manner that will obstruct an orderly procedure in our courts. Thus, if an accused does not act expeditionsly in securing counel, the trial court may, in the exercise of its sound discretion do what is reasonably necessary to meet the situation. *Releford* v. *United States*, 288 *F.* 2d 298, 301 (9 Cir. 1961).

Ten weeks of trial had already elapsed when the court was informed of Ritger's illness. The State, Perwin, Mulvaney, and Brizard had completed presentation of their cases in chief. Yormark had completed his direct examination, had been cross-examined by counsel for Perwin, Mulvaney and Brizard, and was undergoing cross-examination by the prosecutor. Although Mulvaney learned that Ritger was incapacitated on November 16, it is apparent that he did nothing with regard to obtaining a new attorney until the court directed that he do so on November 18. Thereafter he conferred with Bliablias, who is conceded to be an able trial lawyer experienced in the trial of criminal cases. While we think the trial court should have granted Van Riper's request to allow Mulvaney until the following Monday to attempt to secure counsel, we are satisfied that the court's refusal to do so does not constitute reversible error. It is apparent that during the 12-day recess following Bliablias' appointment Mulvaney took no steps to secure counsel of his own choice, an avenue which was open to him if he believed Bliablias would not afford him proper representation. We are satisfied that Mulvaney's constitutional right to the assistance of counsel was not violated; that he was not precluded from a fair opportunity to retain counsel of his own choice if he had so desired, and that under the circumstances

presented the trial court did not abuse its discretion in appointing counsel.

We find no merit in Mulvaney's claim that he was denied the effective assistance of counsel. To warrant the reversal of a criminal conviction on the ground of inadequate legal representation there must be a showing that the defendant was prejudiced thereby—that the representation by counsel was such as to make the trial a farce and a mockery of justice. *State* v. *Bentley*, 46 *N.J.Super.* 193, 203 (App. Div. 1957); and see *State* v. *Dennis*, 43 *N.J.* 418, 426-429 (1964); *State* v. *Wade*, 89 *N.J.Super.* 139, 143 (App. Div. 1965); *State* v. *Woodard*, 102 *N.J.Super.* 419, 429 (App. Div. 1968), certif. den. 53 *N.J.* 64 (1968), *cert. den.* 395 *U.S.* 938 (1969). We have carefully reviewed the record and are convinced that Bliablias rendered able and efficient representation on behalf of Mulvaney. The record demonstrates that he had a knowledge of the facts developed both before and after his appointment and effectively presented the case in defense of his assigned client.

Mulvaney's further contention that he was deprived of his constitutional right to confront witnesses presented against him because he was represented by counsel who was inadequately prepared to assist him is clearly frivolous. His reliance on *Pointer* v. *Texas*, 380 *U.S.* 400 (1965) is misplaced.

V

After the conclusion of testimony and during summations the trial judge was informed by George Wilson, one of the 16 jurors selected to hear the case, that his wife had been approached by a Dr. Brown to speak to the juror on behalf of Mulvaney. A Dr.

Brown had previously testified as a character witness for that defendant. The trial judge conducted a hearing, out of the presence of the other members of the jury, during which Wilson related in detail how Brown had spoken to his wife at the hospital were she was employed and sought to have her influence her husband on Mulvaney's behalf, and further, how Brown had attempted to talk to the juror by telephone. Upon being questioned by the judge, Wilson said that if he were selected to serve on the jury which would decide the case, he could base his decision entirely on the evidence and render a fair and honest verdict without the incident influencing his decision. Defendants' motions to exclude Wilson as a member of the jury were denied, as were motions for a mistrail.

Defendants claim that their rights to a fair and impartial jury were violated because Wilson was permitted to serve on the jury. They argue that the attempt by Brown to influence the juror had the capacity to influence the verdict notwithstanding the juror's statement that it would have no such effect.

A trial judge is vested with broad discretionary powers in deciding whether a juror should be excluded because of a wrongful attempt to influence his decision. Here the juror's responses to the judge's questioning indicated affirmatively that Brown's improper act would not influence him in arriving at a verdict. We conclude that the judge's refusal to remove the juror or to grant a mistrail was a proper exercise of discretion. *Cf. State* v. *Boiardo*, 111 *N.J.Super.* 219 (App. Div. 1970), certif. den. 57 *N.J.* 130 (1970), *cert. den.* 400 *U.S.* 859 (1970).

VI

The remaining points urged by defendants as grounds for a reversal can be disposed of summarily with little comment. Motions for acquittal made by Mulvaney and Brizard were properly denied by the court. The evidence produced by the State, together with all logical inferences which could be drawn therefrom, was sufficient for a jury to find defendants guilty of the charge of conspiracy beyond a reasonable doubt. *State* v. *Reyes*, 50 *N.J.* 454, 458-459 (1967). Mulvaney's motion for a new trial on the ground that the verdict was contrary to the weight of the evidence was also properly denied. *R.* 3:20-1 provides that the trial judge shall not set aside the verdict of the jury as against the weight of the evidence unless, having given due regard to the opportunity of the jury to pass upon the credibility of the witnesses, it clearly and convincingly appears that there was a manifest denial of justice under the law. A review of the record convinces us that the proofs would not have justified such a finding by the trial court.

Perwin, Mulvaney and Yormark contend that their sentences were manifestly excessive and based on improper and unconstitutional policy considerations on the part of the trial judge. They claim they were penalized for their refusals to admit guilt at the sentencing hearing. We find no illegality in the views expressed by the judge during the hearing. There was no threat of an increase in sentence if defendants refused to admit their guilt. Quite to the contrary, the record indicates that after a consideration of the backgrounds of the respective defendants, the judge said he would not impose the maximum

prison terms permitted by law and instead sentenced them to lesser terms in the county penitentiary. The rule is well settled that the *quantum* of the sentence imposed, if within the limits fixed by law, rests within the sound discretion of the trial judge. The burden of establishing that the sentence was excessive rests upon a defendant, and he may succeed in his contention only where it clearly appears that the judge abused his judicial discretion. *State* v. *Cox*, 101 *N.J.Super.* 470, 475 (App. Div. 1968), certif. den. 53 *N.J.* 510 (1969). We have reviewed the sentences imposed in the light of the total circumstances and conclude that there was no abuse of judicial discretion, and the sentences were not excessive.

MATTHEW P. BOYLAN, ESQ.
LOWENSTEIN, SANDLER, BROCHIN,
KOHL & FISCHER
744 Broad Street, Room 2900
Newark, New Jersey 07102
(201) 624-4600

Attorneys for Defendant-Appellant,
Robert B. J. Mulvaney

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Docket No. A-1386-70

STATE OF NEW JERSEY,
Plaintiff-Respondent,
—v—
ROBERT B. J. MULVANEY,
Defendant-Appellant.

TO: DAVID S. BAIME &
ALLEN SILBER
Assistant Prosecutors
c/o Essex County Prosecutor's Office
Essex County Court Building
Newark, New Jersey 07101

SIRS:

PLEASE TAKE NOTICE, that Defendant-Appellant, Robert B. J. Mulvaney, will petition the Supreme Court of New Jersey for certification to the Appellate Division to review the final judgment of conviction entered in the Appellate Division on November 30, 1971. The Appellate Division affirmed De-

fendant-Appellant's conviction of conspiracy to obtain money under false pretenses in violation of N.J.S.A. 2A:98-1. Defendant-Appellant was sentenced to a penitentiary term of 18 months, 12 months

Judgment Sheet
Filed: February 16, 1971

Form A

ESSEX COUNTY COURT
JUDGMENT SHEET

THE STATE OF NEW JERSEY

vs.

Robert Mulvaney
Defendant

Indictment No. 1196-69

Accusation No. _____

Complaint No. _____

Attorney F. C. Vitale, Jr. & F. D. Sullivan

Prosecutor A. Sillow

Court Reporter A. Rojman

The defendant, being charged on Dec. 29, 1969
Date

On Indictment No. 1196-69 Accusation No. _____

Complaint No. _____ for the crime of Conspiracy

and the defendant having pleaded _____ GUILTY X NOT GUILTY

and thereafter, having on Jan. 8, 1971
Date

____RETRACTED PLEA OF NOT GUILTY AND ENTERED PLEA OF GUILTY

X BEEN TRIED ~~without~~ with A JURY AND A VERDICT - ~~FINDING~~

of Guilty having been rendered.

It is, therefore, on Feb. 16, 1971
Date

ordered and adjudged that the defendant be and is sentenced to:

18 mos E.C. Penitentiary, 12 months in custody and six months on probation, Pay fine $1000.00 & pay quarter cost of trial, $16750 £ under 2A:168-2.

RR
Entered by

Judge

RALPH L. FUSCO

D Ma-20

ESSEX COUNTY COURT
JUDGMENT SHEET

Form A

THE STATE OF NEW JERSEY

vs.

Dilton Abrams
Defendant

Indictment No. 1196-69
Accusation No. _____
Complaint No. _____
Attorney A.C. Brown
Prosecutor C. Dilts
Court Reporter A. Primm

The defendant, being charged on Dec. 29, 1969
Date
On Indictment No. 1196-69 Accusation No. _____
Complaint No. _____ for the crime of Conspiracy (1)
and the defendant having pleaded _____ GUILTY X NOT GUILTY
and thereafter, having on Jan 5, 1971
Date
_____ RETRACTED PLEA OF NOT GUILTY AND ENTERED PLEA OF GUILTY
X BEEN TRIED ~~without~~ with A JURY AND A VERDICT - ~~PENDING~~
of Guilty having been rendered.

It is, therefore, on Feb 16 1971
Date
ordered and adjudged that the defendant be and is sentenced to:
Term of 18 months at Essex Co. Penitentiary, 12 months
etc to be served in custody and six months on probation,
5 pay fine $1000 Soc

PS
Entered by

Judge
RUSSO

ESSEX COUNTY COURT
JUDGMENT SHEET

Form A

THE STATE OF NEW JERSEY

vs.

Dritton Hannah
Defendant

Indictment No. 1195-69
Accusation No.
Complaint No.
Attorney P. G. Brown
Prosecutor Wm. Miller
Court Reporter S. Rogan

The defendant, being charged on Dec. 9, 1969
Date

On Indictment No. 1195-69 Accusation No.
Complaint No. for the crime of False Pretense, 3 cts

and the defendant having pleaded GUILTY X NOT GUILTY

and thereafter, having on June 8, 1971
Date

RETRACTED PLEA OF NOT GUILTY AND ENTERED PLEA OF GUILTY

X BEEN TRIED with without A JURY AND A VERDICT - FINDING

of Guilty having been rendered.

It is, therefore, on Feb. 16, 1971
Date

ordered and adjudged that the defendant be and is sentenced to:

#1: Term of 18 months at E.C.P., 12 mos. in county jail & 6 mos. on probation and pay fine $1000.00, consecutive to sentence rendered on Docket 1196-69, #1 & #2: 18 months term at E.C.P., 12 mos. in county & 6 mos. on probation, to run concurrently with sentence on Ct #1, & pay fine $1000.00

Entered by

Judge

#3: Term of 18 mos at E.C.P., suspended Probation 18 mos, concurrent with sentence on Ct #1, & pay fine $1000.00 and pay 1/4 part cost of trial, $167.50, under 2A:168-2.

ESSEX COUNTY, NEW JERSEY

Indictment No. 1196-69

ESSEX COUNTY, TO WIT:

COUNT I

The Grand Jurors of the State of New Jersey, for the County of Essex, upon their oath present that VINCENT MORELLI, MILTON YORMARK, STANLEY, PERWIN, J. L. BRIZARD, ROBERT MULVANEY and ALBERT ALBRIZIO between the 1st day of August, 1967 and the 1st day of February, 1968, in the City of Newark and in the City of East Orange, in the County of Essex aforesaid and within the jurisdiction of this court did commit the crime of conspiracy in that they then and there did corruptly and unlawfully conspire, among themselves and together with Anthony Cortese, who is named as a co-conspirator but not as a defendant herein, and other persons unknown to the Grand Jury aforesaid who alleged themselves to be John McBride, Sr., John McBride, Jr., Phillip Allison, Joseph Taylor, Frank Taylor and Charles Taylor, knowingly, willfully and with intent to agree and to achieve the objects of the consiracy, to wit: The violation of the following criminal statutes of New Jersey: N.J.S. 2A:111-1, obtaining money under false pretenses; N.J.S. 2A:102-5, embezzlement contrary to the provisions of N.J.S. 2A:98-1 against the peace of this State, the government and dignity of the same;

AND the Grand Jurors aforesaid, upon their oath do further present that in the execution of said conspiracy and to effect the object thereof, the following overt acts were committed between the dates of

August 1, 1967 and February 1, 1968, unless otherwise more particularly stated:

1. Between the dates of August 17, 1967 and September 28, 1967, VINCENT MORELLI informed the Maryland American General Group a/k/a Maryland Casualty Company that on or about the 17th of August, 1967, his automobile had collided with an automobile owned by one Joseph Taylor on or near the "J" Street Ramp of the Manhattan Bridge in the City of New York and that the vehicle of Joseph Taylor was carrying five passengers and a driver.

2. On or about August 25, 1967, STANLEY PERWIN advised the Maryland American General Group a/k/a Maryland Casualty Company of Baltimore, Maryland that he represented Joseph Taylor, Frank Taylor and Charles Taylor who had been injured in an automobile accident which occurred August 17th in the City of New York.

3. On or about September 22, 1967 Anthony Cortese gave to VINCENT MORELLI a draft of the Maryland American General Group a/k/a Maryland Casualty Company dated September 22, 1967, made payable to Joseph Taylor in the sum of $3,400.

4. On or about September 22, 1967, ALBERT ALBRIZIO endorsed and deposited into Regal Olds bank account a draft of the Maryland American General Group a/k/a Maryland Casualty Company of Baltimore, Maryland dated September 22, 1967 in the amount of $3,400 which was payable to one Joseph Taylor and endorsed by Joseph Taylor.

5. On or about September 28, 1967, MILTON YORMARK advised the Maryland American General Group a/k/a Maryland Casualty Company that he repre-

sented John McBride, Sr., John McBride, Jr. and Phillip Allison who had been injured in an automobile accident which occurred on August 17, 1967, in the City of New York.

6. On or about December 4, 1967, MILTON YORMARK did receive from Anthony Cortese three drafts from the Maryland American General Group a/k/a Maryland Casualty Company of Baltimore, Maryland dated December 11, 1967 and made payable to Phillip Allison and Milton Yormark, Attorney in the amount of $2,100., John McBride, Sr. and Milton Yormark, Attorney in the amount of $2,175., and John McBride, Jr. and Milton Yormark, Attorney in the amount of $2,150.

7. On or about December 15, 1967, STANLEY PERWIN did receive from Anthony Cortese three drafts of the Maryland American General Group a/k/a Maryland Casualty Company of Baltimore, Maryland dated December 15, 1967, and made payable to Joseph Taylor and Stanley Perwin, Attorney in the amount of $2,150, Frank Taylor and Stanley Perwin, Attorney in the amount of $2,080, and Charles Taylor and Stanley Perwin, attorney in the amount of $2,000.

8. On or about December 15, 1967, STANLEY PERWIN did give to Anthony Cortese signed checks from the Donald Dvorin trust account dated December 29, 1967 and made payable to Joseph Taylor in the amount of $1,485, Charles Taylor in the amount of $1,395 and Frank Taylor in the amount of $1,442.50.

9. Between December 4, 1967 and January 1, 1968, Anthony Cortese did give VICTOR MORELLI three checks drawn on the Donald Dvorin trust account dated December 29, 1967 and made payable to Joseph Taylor in the amount of $2,150, Charles

Taylor in the amount of $1,335.95 and Frank Taylor in the amount of $1,442.50 and three checks drawn on the MILTON YORMARK trust account dated December 11, 1967 and made payable to John McBride, Sr. in the amount of $1,553, John McBride, Jr. in the amount of $1,535 and Phillip Allison in the amount of $1,480.

JOSEPH P. LORDI
County Prosecutor

By:

FRANKLIN M. SACHS
Assistant Prosecutor

Essex County, New Jersey
Indictment No. 2314-68
Filed: May 15, 1969

SUPERIOR COURT OF NEW JERSEY
ESSEX COUNTY

(Law Division—Criminal)

1968 TERM

THE STATE OF NEW JERSEY

vs.

STANLEY PERWIN, AND ROBERT MULVANEY,
ELAINE M. MACKIEWICZ

Defendants

INDICTMENT (6 Counts)

for

CONSPIRACY (3 Counts)
FALSE PRETENSE (3 Counts)

A True Bill

Foreman.

Plea:
Bail:

Presented: May 15, 1969

The within indictment is assigned for disposition by the Essex County Court

A.J.S.C.

ESSEX COUNTY, TO WIT:

COUNT I

The Grand Jurors of the State of New Jersey, for the County of Essex, upon their oath present that STANLEY PERWIN AND ROBERT MULVANEY between the 12th day of August, 1967 and the 12th day of October, 1967, at the City of Newark in the County of Essex aforesaid and within the jurisdiction of this Court, with intent to cheat and defraud the Maryland American General Group A/K/A Maryland Casualty Company of Baltimore, Maryland, did then and there unlawfully, knowingly and designedly falsely represent and pretend to agents of the said Maryland American General Group A/K/A Maryland Casualty Company of Baltimore, Maryland that on or about April, 1967, an accident occurred on the property of Chilton Hall, 127-147 Chilton Street, Elizabeth New Jersey, involving his client, a Joseph Mozzocca, said property being insured by the Maryland American General Group A/K/A Maryland Casualty Company of Baltimore, Maryland, as a result of which Joseph Mozzocca, was injured, and the said Mozzocca was treated by ROBERT MULVANEY, a doctor, and that said accident was caused by the negligence of the assured of the aforesaid Maryland American General Group A/K/A Maryland Casualty Company of Baltimore, Maryland and that medical expenses were incurred by the said Joseph Mozzocca as a result thereof, whereas in truth and fact, the said STANLEY PERWIN AND ROBERT MULVANEY, then and there well knew that no accident occurred at the aforementioned place involving Joseph Mozzocca, and that the said Joseph Mozzocca suffered no injuries and incurred no medical expenses as a result of the negligence of the

assured on the date, at the time and the place set forth in their false representation as the said STANLEY PERWIN AND ROBERT MULVANEY then and there so falsely, knowingly and fraudulently represented and pretended to the said Maryland American General Group A/K/A Maryland Casualty Company of Baltimore, Maryland, and that by means of the said representations and pretenses, the said Maryland American General Group A/K/A Maryland Casualty Company of Baltimore, Maryland, being deceived thereby the said STANLEY PERWIN AND ROBERT MULVANEY then and there unlawfully, knowingly and designedly did obtain from the Maryland American General Group A/K/A Maryland Casualty Company of Baltimore, Maryland, money in the sum of $2,150.00 with intent to cheat and defraud the said Maryland American General Group A/K/A Maryland Casualty Company of Baltimore, Maryland, thereof contrary to the provisions of *N.J.S.* 2A:111-1 and against the peace of this State, the government and dignity of the same.

COUNT II

And the Grand Jurors of the State of New Jersey, for the County of Essex, upon their oath do further present that STANLEY PERWIN AND ROBERT MULVANEY between the 11th day of March 1967, and the 11th day of May, 1967, in the City of Newark, in the County of Essex, and within the jurisdiction of this Court did commit the crime of conspiracy in that he then and there did lawfully and corruptly conspire, confederate and agree with Anthony Cortese, Donald Dvorin and other persons unknown to the Grand Jury who are named as co-conspirators but not as defendants herein, knowingly, willfully and with intent to agree to achieve the objective of the conspiracy,

to wit, to cheat and defraud the Maryland American General Group A/K/A Maryland Casualty Company of Baltimore, Maryland, of large sums of money in violation of *N.J.S.* 2A:111-1, obtaining money under false pretenses, contrary to the provisions of *N.J.S.* 2A:98-1 and against the peace and dignity of this State the government and dignity of the same.

AND the Grand Jurors aforesaid, upon their oath do further present that in the execution of the conspiracy and to affect the object thereof, the following Overt Acts were committed between the dates of August 12, 1967, and October 12, 1967.

OVERT ACTS

1. On or about September 12, 1967, STANLEY PERWIN received from Anthony Cortese an agent of Maryland American General Group A/K/A Maryland Casualty Company of Baltimore, Maryland drafts totaling $2,150.00 in full settlement and satisfaction for liability accruing to the said Joseph Mozzocca from an accident which was alleged to have occurred on April 1967.

COUNT III

And the Grand Jurors of the State of New Jersey, for the County of Essex upon their oath do further present that STANLEY PERWIN and ROBERT MULVANEY, between the 16th day of December, 1967 and the 16th day of February, 1968 at the City of Newark in the County of Essex aforesaid and within the jurisdiction of this Court, with intent to cheat and defraud the Maryland American General Group A/K/A Maryland Casualty Company of Baltimore, Maryland, did then and there unlawfully, knowingly, and design-

edly falsely represent and protend to agents of the said Maryland American General Group A/K/A Maryland Casualty Company of Baltimore, Maryland that on or about March, 1967 an accident occurred on the property of Sacred Heart Church, R.C., involving a Willie Lewis, said property being insured by the Maryland American General Group A/K/A Maryland Casualty Company of Baltimore, Maryland, as a result of which Willie Lewis, was injured, and the said Willie Lewis was treated by Robert Mulvaney, a doctor, and that said accident was caused by the negligence of the assured of the aforesaid Maryland American General Group A/K/A Maryland Casualty Company of Baltimore, Maryland and that medical expenses were incurred by the said Willie Lewis as a result thereof, whereas in truth and fact the said STANLEY PERWIN and ROBERT MULVANEY, then and there well knew that no accident occurred at the aforementioned place involving Willie Lewis, and that the said Willie Lewis suffered no injuries and incurred no medical expenses as a result of the negligence of the assured on the date, at the time and place set forth in his false representation as he the said STANLEY PERWIN and ROBERT MULVANEY then and there so falsely, knowingly and fraudulently represented and pretended to the said Maryland American General Group A/K/A Maryland Casualty Company of Baltimore, Maryland, and that by means of the said representation, the said Maryland American General Group A/K/A Maryland Casualty Company of Baltimore, Maryland, being deceived thereby the said STANLEY PERWIN and ROBERT MULVANEY then and there unlawfully, knowingly and designedly did obtain from the Maryland American General Group A/K/A Maryland Casualty Company of Baltimore,

Maryland, in the sum of $2,175.00 with intent to cheat and defraud the said Maryland American General Group A/K/A Maryland Casualty Company of Baltimore, Maryland thereof contrary to the provisions of *N.J.S.* 2A:111-1 and against the peace of this State, the government and dignity of the same.

COUNT IV

The Grand Jurors of the State of New Jersey, for the County of Essex, upon their oath do further present that STANLEY PERWIN and ROBERT MULVANEY between the 1st day of February, 1967 and the 1st day of April, 1967, in the City of Newark, in the County of Essex, and within the jurisdiction of this Court did commit the crime of conspiracy in that they then and there lawfully and corruptly conspire, confederate and agree with Anthony Cortese, Donald Dvorin and other persons unknown to the Grand Jury who are named as co-conspirators but not as defendants herein, knowingly, willfully and with intent to agree to achieve the objective of the conspiracy, to wit, to cheat and defraud the Maryland American General Group A/K/A Maryland Casualty Company of Baltimore, Maryland, of large sums of money in violation of *N.J.S.* 2A:111-1, obtaining money under false pretenses, contrary to the provisions of *N.J.S.* 2A:98-1 and against the peace and dignity of this State, the government and the dignity of the same.

AND the Grand Jurors aforesaid, upon their oath do further present that in the execution of the conspiracy and to affect the object thereof, the following Overt Acts were committed between the dates of December 16, 1967 and February 16, 1968.

OVERT ACTS

1. During the month of January, 1968, STANLEY PERWIN obtained a fraudulent medical bill from DR. ROBERT MULVANEY.

2. On or about January 16, 1968, STANLEY PERWIN received from Anthony Cortese an agent of Maryland American General Group A/K/A Maryland Casualty Company of Baltimore, Maryland, drafts totalling $2,175.00 in full settlement and satisfaction for liability accruing to the said Willie Lewis from a fictitious accident which was alleged to have occurred in March, 1967.

COUNT V

The Grand Jurors of the State of New Jersey, for the County of Essex, upon their oath present that STANLEY PERWIN and ROBERT MULVANEY, between the 6th day of December, 1966 and the 6th day of February, 1967 at the City of Newark in the County of Essex aforesaid and within the jurisdiction of this Court, with intent to cheat and defraud the Maryland American General Group A/K/A Maryland Casualty Company of Baltimore, Maryland, did then and there unlawfully, knowingly and designedly falsely represent and pretend to agents of the said Maryland American General Group A/K/A Maryland Casualty Company of Baltimore, Maryland that on or about October 15, 1966 an accident occurred on the property of St. Lucy's Church, 118 Seventh Avenue, Newark, New Jersey, involving a Joseph Vesper, said property being insured by the Maryland American General Group A/K/A Maryland Casualty Company of Baltimore, Maryland, as a result of which Joseph Vesper was injured, and the said Joseph Vesper was treated

by ROBERT MULVANEY, a doctor, and that said accident was caused by the negligence of the assured of the aforesaid Maryland American General Group A/K/A Maryland Casualty Company of Baltimore, Maryland and that medical expenses were incurred by the said Joseph Vesper as a result thereof, whereas in truth and fact, the said STANLEY PERWIN and ROBERT MULVANEY, then and there well knew that no accident occurred at the aforementioned place involving Joseph Vesper, and that the said Joseph Vesper suffered no injuries and incurred no medical expenses as a result of the negligence of the assurd on the date, at the time and place set forth in his false representation as they the said STANLEY PERWIN and ROBERT MULVANEY then and there so falsely, knowingly and fraudulently represented and pretended to the said Maryland American General Group A/K/A Maryland Casualty Company of Baltimore, Maryland, that by means of the said representation and pretenses, the said Maryland American General Group A/K/A Maryland Casualty Company of Baltimore, Maryland, being deceived thereby the said STANLEY PERWIN and ROBERT MULVANEY then and there unlawfully, knowingly and designedly obtain from the Maryland American General Group A/K/A Maryland Casualty Company of Baltimore, Maryland, money in the sum of $2,050.00 with intent to cheat and defraud the said Maryland American General Group A/K/A Maryland Casualty Company of Baltimore, Maryland thereof contrary to the provisions of *N.J.S.* 2A:111-1 and against the peace of this State, the government and dignity of the same.

COUNT VI

The Grand Jurors of the State of New Jersey, for the County of Essex, upon their oath do further

present that STANLEY PERWIN, ROBERT MULVANEY and ELAINE M. MACKIEWICZ A/K/A ELAINE M. KOCHERA between the 15th day of September, 1966 and the 15th day of November, 1966 in the City of Newark, in the County of Essex, and within the jurisdiction of this Court did commit the crime of conspiracy in that they then and there did lawfully and corruptly conspire, confederate and agree with Anthony Cortese, Donald Dvorin and other persons unknown to the Grand Jury who are named as co-conspirators but not as defendants herein, knowingly, willfully and with intent to agree to achieve the objective of the conspiracy, to wit, to cheat and defraud the Maryland American General Group A/K/A Maryland Casualty Company of Baltimore, Maryland, of large sums of money in violation of *N.J.S.* 2A:111-1, obtaining money under false pretenses, contrary to the provisions of *N.J.S.* 2A:98-1 and against the peace and dignity of this State, the government and the dignity of the same.

AND the Grand Jurors aforesaid, upon their oath do further present that in the execution of the conspiracy and to affect the object thereof, the following Overt Acts were committed between the dates of December 6, 1966 and February 6, 1967.

OVERT ACTS

1. On or about January 10, 1967 STANLEY PERWIN obtained a frudulent medical bill from DR. ROBERT MULVANEY.

2. On or about January 6, 1967 STANLEY PERWIN received from Anthony Cortese an agent of Maryland American General Group A/K/A Maryland Casualty Company of Baltimore, Maryland, drafts totalling

$2,050.00 in full settlement and satisfaction for all liability accruing to the said Joseph Vesper from an accident which was alleged to have occurred on October 15, 1966.

3. On or about

ELAINE M. MACKIEWICZ A/K/A ELAINE M. KOCHERA executed the jurat on a release in which release the releaser was named as Joseph Vesper.

JOSEPH P. LORDI
COUNTY PROSECUTOR OF ESSEX COUNTY

By: _____
ROBERT A. BLAIME
Assistant Prosecutor

Notice of Motion to Amend
Indictment No. 2314-68

JOSEPH P. LORDI
County Prosecutor of Essex County
Essex County Court House
Newark, New Jersey 07102
(201) 624-1515

SUPERIOR COURT OF NEW JERSEY

ESSEX COUNTY—LAW DIVISION

Indictment No. 2314-68

STATE OF NEW JERSEY

vs.

STANLEY PERWIN, ROBERT MULVANEY and
ELAINE M. MACKIEWICZ,
Defendants.

NOTICE OF MOTION TO AMEND INDICTMENT

To: Frederic C. Ritger, Jr., Esq.
744 Broad Street
Newark, New Jersey 07102

Justin P. Walder, Esq.
17 Academy Street
Newark, New Jersey 07102

Clive S. Cummis, Esq.
23 Fulton Street
Newark, New Jersey 07102

SIRS:

PLEASE TAKE NOTICE that on December 3, 1969, at 9:30 o'clock in the forenoon, or as soon thereafter

as counsel may be heard, the undersigned, Attorney for the State of New Jersey, will apply to Superior Court of New Jersey, Law Division, Criminal, Essex County, at the Court House, Newark, New Jersey, for an Order permitting an amendment of Indictment No. 2314-68 as follows: in accordance with Rule 3:7-4:

COUNT I—Amending the beginning date from the "12th day of August, 1967" to the "24th day of April, 1967".

COUNT II—Amending the last date from the "11th day of May, 1967" to the "12th day of October, 1967".

COUNT IV—Amending the last date of the conspiracy from "the 15th day of November, to the "16th day of February, 1968".

COUNT VI—Amending the last day of the conspiracy fro m"the 15th day of November, 1966" to "the 1st day of February, 1967".

TAKE FURTHER NOTICE that at the time and place aforesaid we shall further apply for an Order severing for trial the case of State vs. Elaine M. Mackiewicz.

JOSEPH P. LORDI
County Prosecutor

By: /s/ Alan Silber
ALAN SILBER
Assistant Prosecutor

SUPREME COURT, U. S.

FILED

MAY 24 1972

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1352

ROBERT B. J. MULVANEY and MILTON YORMARK,

Petitioners,

vs.

STATE OF NEW JERSEY,

Respondent.

On Petition for Writs of Certiorari to the Superior Court of New Jersey, Appellate Division

STATE'S BRIEF IN OPPOSITION

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Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-8611-12

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No.

ROBERT B. J. MULVANEY and MILTON YORMARK,

Petitioners,

vs.

STATE OF NEW JERSEY,

Respondent.

On Petition for Writs of Certiorari to the Superior Court of New Jersey, Appellate Division

STATE'S BRIEF IN OPPOSITION

Opinion

The Orders of the Supreme Court of the State of New Jersey denying certification were without opinion and are printed in 60 N. J. 139, 286 A. 2d 512 (Pa23)* and

* Indicates petitioner's appendix.

60 N. J. 138, 286 A. 2d 511 (Pa24). The opinion of the Appellate Division of the Superior Court of New Jersey affirming the judgment of conviction is printed in 117 N. J. Super. 315, 284 A. 2d 549 (App. Div. 1971) (Pa25 to 51).

Jurisdiction

The State does not question the jurisdiction of this Court to entertain the present applications for writs of certiorari. Nevertheless, it is submitted that this Court should dismiss petitioner Yormark's application since he failed to surrender in accordance with an order issued by the Supreme Court of New Jersey. The State's motions to forfeit bail and for the issuance of a bench warrant were granted by the Essex County Court. The Essex County Grand Jury subsequently returned an indictment charging petitioner Yormak with having unlawfully left the jurisdiction. While the instant matter constitutes "a case or controversy," no persuasive reason exists "why this Court should proceed to adjudicate the merits of a criminal case after the convicted defendant who has sought review escapes from the restraints placed upon him pursuant to the conviction." *Molinaro* v. *New Jersey*, 396 U. S. 365, 366 (1970). See also *Bonahan* v. *Nebraska*, 125 U. S. 692 (1887); *Smith* v. *United States*, 94 U. S. 597 (1876). Petitioner, a fugitive from justice, is thus estopped from calling upon "the resources of this Court for determination of his claims." *Molinaro* v. *New Jersey*, *supra*, at 366.

Statement of the Case

Petitioners seek a writ of certiorari to review a decision rendered by the New Jersey Superior Court, Appellate Division, affirming their convictions for conspiracy

to defraud the Maryland Casualty Company. N.J.S. 2A:98-1. Petitioner Yormark also seeks relief from a judgment of conviction for three counts of the substantive offense of conviction for three counts of the substantive offense of obtaining money under false pretenses. N.J.S. 2A:111-1. Following the Appellate Division's affirmance of their convictions, petitioners filed applications for certification to the Supreme Court of New Jersey which were subsequently denied without opinion.

The convictions were based upon three separate indictments returned by the Essex County Grand Jury. A single indictment charged petitioners Yormark and Mulvaney, along with defendants J. L. Brizard and Stanley Perwin, with conspiracy to obtain money under false pretenses and to unlawfully embezzle funds belonging to Maryland Casualty. Vincent Morelli and Albert Albrizio were also named as defendants in that indictment, but charges against the former were dismissed following the trial and Albrizio's case was severed. Two separate indictments charged petitioner Yormark and defendant Perwin with three counts of the substantive crime of obtaining money under false pretenses.

The charges against both petitioners emanated from their participation in a complex scheme to present and prosecute false claims concerning a nonexistent accident with an insured of Maryland Casualty. Anthony Cortese, then a supervisor of Maryland Casualty, and Vincent Morelli, a policyholder, initially discussed the possibility of presenting a false claim long before any of the petitioners became involved. Cortese, whose main concern was to make the Maryland Casualty file appear legitimate, wished to utilize the services of two attorneys in the fraud. Cortese knew that one attorney, Stanley Perwin, would assist him, and asked Morelli if he would be able

to enlist the support of another lawyer to provide medical bills. The main role or function of the attorneys in the conspiracy was to provide medical bills and other legal documents on behalf of the nonexistent claimants.

Morelli began to search for the other attorney by visiting various automobile body shops in the Jersey City area, and asking if anyone knew a lawyer who "would represent some people in an accident that had not yet happened." Morelli was acquainted with a jeweler in Newark named Hy Chuven and asked if he knew of a lawyer who would represent some people in a "phony" accident. Chuven replied that he would "ask around" and took Morelli's unlisted telephone number. That evening or the next day, Morelli received a telephone call from someone who identified himself as Milton Yormark, who stated that he was a friend of Hy Chuven. Yormark said, "I hear you have something for me."

Morelli could not recognize the voice at that time as being that of Milton Yormark. Nevertheless, he specifically told Yormark that he wanted him to represent some claimants in a "phony accident case". He further advised the lawyer that there would be six claimants but that he would represent only three.

Shortly thereafter, Cortese contacted Perwin at the latter's office and asked whether he wished to participate in a "claim [that] was going to be presented against . . . Maryland Casualty . . .". Perwin then agreed to supply medical bills on behalf of three fictitious claimants.

Thus, in the middle of August, all was in readiness. The "Taylor accident" was reported to the insurance company on August 18, 1969. "Medical bills" for the bogus claimants were subsequently submitted by the physicians, Mulvaney and Brizard, to Yormark and Perwin, the at-

torneys of record, and these, in turn, were forwarded to Cortese, the claims supervisor. . Releases were then prepared in blank for each claimant and Cortese issued Maryland Casualty drafts payable to the attorney and the fictitious plaintiffs. Yormark then drew a check on his office trust account payable to each of the claimants, less his fee. These checks were subsequently forged, cashed, and the proceeds shared by Cortese and Morelli. Dr. Mulvaney was paid his "fee" of $300.00, instead of his billed charges of $685.00, by way of check from Perwin.

In addition to the testimony of Cortese and Morelli implicating petitioners, other evidence was introduced to prove that Mulvaney was aware of the fictitious nature of the Taylor claims. This evidence was admitted pursuant to *New Jersey Evidence Rule 55* to rebut Mulvaney's defense that he had been duped.[1] The evidence introduced related to certain claims which Perwin had previously presented against persons insured by Maryland Casualty. Included among these cases were the Joseph Vesper, Willie Lewis and Joseph Mozzocca claims. In all but one of these cases, petitioner Mulvaney was the treating physician and medical bills and reports bearing his signature were ultimately received by the insurance company.[2] In each instance, Cortese issued a Maryland Casualty draft, but Morelli, who played a crucial

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[1] Rule 55 provides as follows: Subject to Rule 47, evidence that a person committed a crime or civil wrong on a specified occasion, is inadmissable to prove his disposition to commit crime or civil wrong on another specified occasion but, subject to Rule 48, such evidence is admissable to prove some fact in issue including motive, intent, plan, knowledge, identity, or absence of mistake or accident.

[2] Another doctor was involved with respect to the Mozzocca claim.

role in the Taylor conspiracy was in no way involved. Unlike the Taylor claim, these cases all involved injuries allegedly sustained in accidental falls. The admission of this evidence was upheld upon review by the Appellate Division and forms one of the bases upon which petitioners' present application is grounded.

At trial, petitioner Mulvaney moved to dismiss the indictment, contending that he was immune from prosecution on the Taylor conspiracy because of a prior acquittal following the trial of a six count indictment charging him and Perwin with separate offenses of obtaining money by false pretenses (N.J.S. 2A:111-1) and with conspiracies to commit such crimes (N.J.S. 2A:98-1). These charges were based on the preparation and filing of three fraudulent accident claims on behalf of three fictitious claimants. The bogus claims were paid to Joseph Vesper for injuries allegedly sustained on October 15, 1966; to Willie Lewis for injuries allegedly sustained on March 3, 1967, and to Joseph Mozzocca for injuries allegedly received on April 19, 1967. Petitioner Mulvaney contended that the State had carved one continuous conspiracy into four separate illegal agreements and that, by reason of the acquittal on the previous indictment, the State was barred from prosecuting the present charges relating to the Taylor conspiracy. Petitioner's motion to dismiss was denied by the trial court upon its finding that the indictment in question charged a separate and distinct conspiracy based on a nonexistent accident which occurred "at a separate time, at a different place and involving different principals."

Petitioners were convicted and all subsequent applications and efforts to obtain a reversal have failed. On March 30, 1972 petitioners' applications for a stay of sentence were denied. Yormark, who did not surrender, remains at large and has been indicted for unlawfully leaving the jurisdiction.

REASONS FOR DENYING THE GRANT

POINT I

Petitioner's trial and convicition for the Taylor conspiracy was not in violation of the double jeopardy clause of the Fifth Amendment.

Petitioners first contend that their unlawful agreement which formed the subject matter of the immediate prosecution was part of a single and continuing conspiracy to submit false claims to Maryland Casualty. More specifically, it is argued that the present prosecution was constitutionally barred by virtue of Mulvaney's prior acquittal. The State submits that each separate agreement had its own distinct illegal objective. Each conspiracy was an end in itself, separate from the others and thus the prohibition of double jeopardy is not applicable.

It is now well settled that the doctrines of double jeopardy and collateral estoppel are binding upon the states as a matter of Federal constitutional law. *Benton* v. *Maryland*, 395 U. S. 784 (1970); *Ashe* v. *Swenson*, 397 U. S. 436 (1970); *North Carolina* v. *Pierce*, 395 U. S. 711 (1969). Accordingly, repeated "prosecution for the same offense after acquittal" is barred by the Fifth and Fourteenth Amendments. *North Carolina* v. *Pierce*, *supra*. New Jersey has long applied these well recognized principles based upon "considerations [of] fairness and fulfillment of reasonable expectations in the light of . . . constitutional goals." *State* v. *Currie*, 41 N. J. 531, 539, 197 A. 2d 678, 680 (1964). See also *State* v. *Bell*, 55 N. J. 239, 260 A. 2d 849 (1970); *State* v. *Cormier*, 46 N. J. 494, 218 A. 2d 138 (1966).

When applying the double jeopardy standard to the law of conspiracy, the court must closely scrutinize the scope of the unlawful agreement. *Kotteakos* v. *United States*, 328 U. S. 750 (1945); *United States* v. *Varelli*, 407 F. 2d 735 (7th Cir. 1969). The test is whether the conspiring parties entertain "a common, continuing objective" embracing a series of criminal acts. *United States* v. *H. E. Koouty Creamery*, 257 F. Supp. 295, 305 (D. Md. 1966). Double jeopardy will act as a bar only where it can be shown that the subsequent prosecution rests solely upon the same agreement that was involved in the former. Where identity of the agreement is established, no matter how variegated the criminal purposes contemplated, the same conspiracy is involved. *Braverman* v. *United States*, 317 U. S. 49, 54 (1942); *United States* v. *Kissel*, 218 U. S. 601 (1910); *Blumenthal* v. *United States*, 332 U. S. 539 (1947); *United States* v. *Palermo*, 410 F. 2d 468 (7th Cir. 1969); *Short* v. *United States*, 91 F. 2d 614 (4th Cir. 1937); *United States* v. *Coplon*, 88 F. Supp. 912 (S. D. 1949).

Where two agreements cannot be tied together to form an all-inclusive combination directed towards the attainment of a single unlawful result, the evidence conclusively establishes multiple conspiracies. The simple showing of a pattern "of separate spokes meeting at a common center" without a "rim" enclosing the "wheel" fails to prove that a series of criminal acts falls within the purview of a single agreement. *Kotteakos* v. *United States, supra*, this court reversed a conviction where separate agreements all involved a single prominent figure. There, it was said that, at most, the proofs disclosed "a succession of separate conspiracies." *Ibid.* Similarly, in *United States* v. *Varelli, supra*, sep-

arate conspiracies were found although both agreements embraced many common participants. And in *United States* v. *D'Antonio*, 362 F. 2d 151 (7th Cir. 1956), the Court of Appeals for the Seventh Circuit held that a conspiracy to counterfeit Series E Bonds was separate and distinct from an unlawful agreement to counterfeit travelers checks despite the "similarity in the subject matter and objectives" of both crimes.

In contrast, the courts have found a single conspiracy to exist where the plot contemplates "bringing to pass a continuous result".[3] *United States* v. *Kissel*, *supra*, at 607. See also *United States* v. *Palermo*, *supra*; *United States* v. *Manton*, 107 F. 2d 834 (2d Cir. 1939); *United States* v. *Mazzochi*, 75 F. 2d 497 (2d Cir. 1935). In *United States* v. *Hutul*, 416 F. 2d 607, 619 (7th Cir. 1969), for example, the Seventh Circuit found that a series of bogus accidents lent credence to the finding that the participants were members of a "sodality of fraud." There, the conspirators defrauded various insurance companies by means of false pretenses and representations. The evidence showed six accident claims filed within a three month period and further disclosed that the desired result was not one accident upon which a claim could be based but a continuing objective of many accidents. Such was clearly not petitioners' objective in the case *sub judice*.

An examination of the records of both trials reveals the patent frivolity of petitioners' argument. At the former trial, the State's proofs disclosed the existence of three

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[3] The cases in New Jersey are in accord with the general rule. See *State* v. *Ellenstein*, 121 N.J.L. 304, 2A 2d 454 (S.Ct. 1938); *State* v. *Continental Purchasing Company*, 119 N.J.L. 257, 195 Atl. 827 (S.Ct. 1938), aff'd 121 N.J.L. 76 (E & A 1938); *State* v. *Profita*, 114 N.J.L. 334, 176 Atl. 683 (E & A 1934).

separate and distinct agreements. The object or purpose of each conspiracy was to defraud the insurance company with respect to a particular fictitious claim. Anthony Cortese testified that in each instance, he contacted defendant Perwin who, in turn, enlisted the assistance of a physician. Petitioner Mulvaney was involved in two of the three false claims submitted to Maryland Casualty.

Each unlawful agreement was the result of a separate conversation between Cortese and Perwin. Cortese initially contacted Perwin at the latter's office and asked if the attorney would "represent a friend who had been injured" in a fall on premises insured by Maryland Casualty. Perwin agreed to supply medical bills. When Cortese again contacted Perwin, he was advised that petitioner Mulvaney would prepare medical bills and a physician's report. Cortese gave no indication whatever that other false claims were to follow.

Shortly thereafter, Cortese again contacted Perwin and asked if he would represent another "friend" who had fallen on premises insured by Maryland Casualty. Again, Perwin agreed to supply medical bills and Mulvaney was included in this conspiracy for that purpose.

A third claim against Maryland Casualty was eventually submitted by Perwin, this time without Mulvaney's assistance. As in the past, this conspiracy was based upon a telephone conversation between Perwin and Cortese. Substantially, the same pattern of events took place as before.

It is clear that nothing presented at the first trial supports petitioner's argument that there was one agreement and hence one conspiracy. At no time before, during, or after the trial did Mulvaney object to the State's charge that there were three separate conspiracies involved. Nor

was it claimed that the three conspiracies charged in the first indictment comprised, in reality, one unlawful agreement. It was not until the indictment in the instant case was returned and an acquittal in the former trial was obtained that the cry of "one conspiracy" was heard.

The record in the second trial is likewise devoid of evidence revealing a continuing agreement embracing the Taylor as well as the Vesper and Lewis accidents. Here again, Cortese contacted Perwin and asked if he wished to participate in filing a false claim against an insured of Maryland Casualty. Perwin consented and enlisted petitioner Mulvaney's assistance. Vincent Morelli, who was not involved in the Vesper and Lewis frauds, brought Yormark into the unlawful combination and then reported a false accident. In addition, Morelli sent "bodies" to the insurance company doctors for examinations and subsequently assisted in forging the Maryland Casualty drafts which had been issued by Cortese. The Taylor conspiracy was in no way related to the Vesper and Lewis cases and its success or failure was not dependent upon them.

Petitioners have made on showing that they entered into a single agreement to prosecute false claims as to a series of "accidents". Instead, each fictitious "accident" was the result of a separate and distinct agreement and, hence, a separate conspiracy to defraud Maryland Casualty. No single agreement embracing all of the fictitious accidents was ever made or discussed between the common conspirators. The Taylor accident and the six claims prosecuted was planned and agreed upon separately and distinctly from the claims which formed the subject matter of petitioner Mulvaney's first trial. In essence, the planning for each conspiracy contemplated nothing more than the particular bogus accident involved. Under these circumstances, the factual finding of the Appellate Division was proper and fully supported by the record.

POINT II

Multiple prosecutions were necessary and proper.

Petitioner next contends that the State deliberately embarked upon a course of conduct designed to harass and subject him to multiple prosecutions. It is argued that the State intentionally delayed the return of the Taylor indictment until "all evidence in petitioner Mulvaney's first false claims trial had been introduced." (Pb16).

Suffice it to say that petitioner's spurious claim of prosecutorial misconduct is totally without factual support. The Maryland Casualty investigation commenced in January, 1969 and was not completed until some time in late 1970. The investigation related to hundreds of false claims that had been submitted to the insurance company and over thirty indictments were eventually returned. Early in the investigatory stage, a policy decision was made in the Prosecutor's Office to maintain a separate file for each of the numerous bogus claims. As the investigation progressed, it became apparent that each fictitious accident was the product of a separate and distinct conspiracy.

Initially, Cortese and Morelli refused to cooperate, but as the evidence accumulated, both conspirators agreed to testify in return for a promise of immunity from prosecution. Nevertheless, their cooperation came only grudgingly and only after particular claims were found to be fraudulent. In the beginning of September, 1969, it became apparent that Dr. Mulvaney was in some way involved in the Taylor conspiracy. At that time, members of the Prosecutor's Office and counsel for Mulvaney, entered into delicate negotiations relating to a possible grant of immunity in return for a promise by petitioner to tes-

tify against defendant Perwin. These negotiations were still taking place when, on September 8, 1969, the Grand Jury returned indictments against petitioner Yormark and defendant Perwin. Sixteen weeks later, on December 29, 1969, superseding indictments were returned again charging both Perwin and Yormark with obtaining money by false pretenses. Additionally, a single indictment was issued charging Mulvaney and Brizard, along with the attorneys, with having conspired to commit the substantive offenses. By this time, the State was in possession of ample evidence revealing Mulvaney's precise role in the crime charged.

Thus, contrary to petitioner's conclusory assertion, the return of the indictment charging Mulvaney with the Taylor conspiracy was not deliberately delayed. Rather, the time interval resulted from negotiations in which counsel for Mulvaney willingly participated and from the receipt of other evidence which clearly disclosed petitioner's precise role in the conspiracy. The record is barren of any evidence supporting petitioner's theory that the State attempted to "wear the accused out by a multitude of cases with accumulated trials." *Palko* v. *Connecticut*, 302 U. S. 319, 328 (1937). See also *Hoag* v. *New Jersey*, 356 U. S. 464, 467 (1958). Nor has there been a showing of a nefarious plan to suppress or hide evidence to permit its use at a subsequent date in a series of trials relating to a single transaction or a series of related events. *Palko* v. *Connecticut*, *supra*, at 328. Cf. *Napue* v. *Illinois*, 360 U. S. 204 (1959). Clearly, the conduct of the prosecution conformed with fundamental notions of fairness.

The record is similarly devoid of any evidence that the State attempted to subject petitioner to a multitude of separate prosecutions. It is abundantly clear that the indictments against petitioner Mulvaney could not have

been consolidated for a single trial. The State was confronted with three alternatives as to the manner in which the four conspiracies were to be tried:

(1) All four claims could be tried together and all defendants could be joined (including Yormark and Brizard). This method would have the advantage of trying all charges against petitioner Mulvaney and defendant Perwin in one action. However, it was felt that this advantage was outweighed by other factors. Yormark and Brizard could validly claim that the evidence as to Vesper, Mozzocca and Lewis, with which they were not implicated, would prejudice their rights.

(2) All four claims could be tried together as to Perwin and Mulvaney, with Yormark and Brizard being tried separately on the Taylor claim. This method also would have the advantage of trying all charges against Perwin and Mulvaney in one action. However, this advantage was outweighed by the fact that this would necessitate splitting up the Taylor claim conspiracy and duplicating a lengthy trial. This would have wasted the time of the trial court as well as that of the State and the defendants.

(3) The Vesper, Mozzocca and Lewis cases could be tried in one action with Mulvaney and Perwin as co-defendants and the Taylor case could be tried in another action, joining Yormark and Brizard with Mulvaney and Perwin. It was felt that this method would avoid the unacceptable disadvantages of both of the other alternatives. For these reasons, the State opted for the third alternative. The State submits that its decision was the most equitable that could have been made under the circumstances.

This Court has never fashioned a mandatory joinder rule of constitutional dimension. As indicated above, such

a rule would often serve to prejudice persons accused of criminal conduct. The obvious import of *Hoag* v. *New Jersey, supra* and related cases is that a State may not deliberately harass an accused by unreasonably subjecting him to a multitude of prosecutions. The sequence of events here shown to exist clearly discloses that the prosecution's conduct was reasonable and in keeping with this Court's admonition in *Hoag* and *Palko*.

No one "currently questions the great worth of the constitutional safeguard against double jeopardy" since it "justly assures that the State with its great resources will not be permitted to harass and oppress the individual by multiple prosecution or punishment for the same offense." *State* v. *Currie, supra* at 538. Conversely, the joinder of separate and distinct conspiracies in a single prosecution is pregnant with the dangers of undue prejudice for the issues to be resolved become "so vague" as to defy definition. *Krulewitch* v. *United States*, 336 U. S. 440 (1949). "Prior cases in this court have repeatedly warned" that "attempts to broaden the already pervasive and widesweeping nets of conspiracy prosecutions" will be viewed "with disfavor" *Grunewald* v. *United States*, 353 U. S. 391, 404 (1957). Here, the State fully complied with that admonition and attempted to limit the scope of the issues to be resolved by the jury by presenting a separate prosecution for each distinct agreement. Clearly, petitioners do not have cause to complain since constitutional principles were fully complied with and they received a fair trial.

POINT III

Evidence relating to the Vesper and Lewis claims was properly admitted and was not barred by the doctrine of collateral estoppel.

The State's proof at trial disclosed a complex unlawful conspiracy to submit false claims with regard to a nonexistent accident involving fictitious claimants. In order to execute the conspiratorial objects, it was necessary to enlist the support and active participation of Doctor Mulvaney. His role in the conspiracy was to provide fraudulent medical bills and reports in order to make the claims appear legitimate.

Petitioner did not contend below nor does he argue here that the Taylor accident, in fact, occurred or that the claimants were anything other than fictitious. Throughout the trial and in the appeal below, Doctor Mulvaney maintained the position that he was not a knowing participant in the criminal scheme. It was, thus, incumbent upon the prosecution to prove an evil state of mind.

Despite this obvious fact, petitioner contends that the trial court erred in admitting testimony relating to other similar instances of misconduct which were not embraced in the present indictment. More specifically, it is argued that his prior acquittal with respect to the Vesper and Lewis matters precludes the admission of evidence of other crimes which is otherwise admissible. It is true that a part of the testimony presented on rebuttal concerned events which were the subject of a prior prosecution resulting in an acquittal, but the introduction of such evidence was merely incidental to proof of the main issue. The fact that an accused was tried and acquitted of another offense does not bar the introduction of evidence in a subsequent prosecution to illustrate his state of mind.

The great weight of authority throughout the country clearly supports the State's position. In *Hodges* v. *State*, 85 Ga. App. 617, 70 S. E. 2d 48 (Ct. of App. 1952), *certif.* denied 209 Ga. 283, 71 S. E. 2d 543, *cert.* denied 344 U. S. 903, a single accusation charged defendant with five separate counts of operating an illegal lottery. At the conclusion of the State's proofs, the trial judge dismissed two counts holding that the State had failed to present prima facie cases. Nevertheless, the prosecutor during his summation alluded to much of the evidence which had been presented with respect to the two counts dismissed by the judge, and argued that it could be considered in determining whether defendant was knowlegeable with respect to the crimes charged in the remaining counts. On appeal, defendant argued that his acquittal barred the prosecutor from commenting upon the evidence of other crimes. The Georgia Court of Appeals was not persuaded, however, and held that the prosecutor's comments were proper. The Court went on to say:

> Nor is the contention sound that this evidence should have been ruled out because it relates to other alleged offenses for which this defendant had been previously tried and acquitted. While the defendant had been tried and acquitted of previous alleged offenses, and the verdict of not guilty may have indicated that there was not sufficient evidence to convince the jury beyond a reasonable doubt of his guilt, still the acquittal would not necessarily exclude the evidence, because the evidence may tend to illustrate the acts of the defendant as shown in the transaction for which he is now on trial, and may be considered in connection with later evidence, though of itself insufficient to authorize a verdict of guilty. *Id.* at 50.

Of similar import is the Michigan Supreme Court's decision in *People* v. *Johnson*, 328 Mich. 213, 43 N. W. 2d 334 (Sup. Ct. 1950). There, defendant, a public officer, was convicted of accepting a bribe and appealed claiming that the admission of evidence of other bribes for which he had previously been acquitted was improper. The Court held that the evidence complained of was admissible to prove defendant's unlawful intent. The Court stated:

> The fact the accused was tried and acquitted of the other offense does not bar the introduction of evidence thereof in a prosecution for bribery where such evidence shows the general plan or system of the bribe or illustrates the accused's acts in the transaction on trial, or throws light on the later evidence.
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> • • •
>
> Defendant is not on trial for the offense charged against him in the prior case. The question presently at issue is whether as charged by the prosecution he accepted a bribe in violation of the statute on which the information is based. Testimony tending legitimately to establish such offense, or some element thereof, may not be excluded solely on the ground that it was offered and received in the prior case as bearing on defendant's guilt of the offense there charged. *Id.* at 340.

For those other state cases supporting the prosecution's position, see *Robinson* v. *State*, 40 Ala. App. 101, 108 So. 2d 188 (Ct. of App. 1959) (defendant found guilty of unlawfully possessing a revolver and appealed upon the ground that evidence of a prior similar criminal charge had been erroneously admitted. The Court held that the

evidence was admissible to prove defendant's guilty intent stating "[W]e are clearly of the opinion that the fact that a defendant in a criminal prosecution has been acquitted of another offense does not render evidence of such prior offense inadmissible if such evidence is otherwise competent"); *People* v. *Massey*, 196 Cal. App. 2d 230, 16 Cal. Rptr. 402 (Ct. of App. 1961) (defendant was indicted and tried for burglary. At this trial the State presented evidence of a subsequent burglary in the same neighborhood to show defendant's identity although there was a prior acquittal with respect to that charge. The Court affirmed the conviction stating, "It is well established, however, that an acquittal does not prevent the admissibility of evidence concerning another wrongful act as conviction of the offense is not a prerequisite to the introduction of such evidence"); *People* v. *Brown*, 118 Cal. App. 2d 549, 336 P. 2d 1 (Ct. of App. 1959) (The State introduced evidence of prior offenses for which defendant had not been convicted. The Court affirmed holding "Conviction of the offense is not always a prerequisite to the introduction of evidence concerning other wrongful acts"); *People* v. *Raleigh*, 83 Cal. App. 2d 435, 189 P. 2d 70 (Ct. of App. 1962) (The State offered evidence of other crimes for which defendant had been acquitted. In affirming defendant's conviction the Court stated "[T]he rule is well settled in England as well as in this country that an acquittal . . . does not prevent the admissibility of the evidence"); *Taylor* v. *State*, 174 Ga. 52, 162 S. E. 504 (Sup. Ct. 1932) (Evidence of other crimes of a similar nature introduced by the State to prove defendant's guilty knowledge. The Court affirmed, stating "Though the defendant may have been tried for violating the law as to one or more of these transactions with other patients and acquitted, the State may, nevertheless, prove the facts connected with them for the

purpose of illustrating the defendant's state of mind as to the transaction at bar"); *Koenigstein* v. *State*, 101 Neb. 229, 162 N. W. 879 (Sup. Ct. 1917) (defendant was tried and found guilty of bribery. At trial, the State introduced evidence of other bribes for which defendant had been previously acquitted. The Court in affirming the conviction opined "at all events it seems that receipt of such evidence cannot be said to put the defendant in jeopardy the second time for the same offense"); *State* v. *Varner*, 329 S. W. 2d 623 (Sup. Ct. 1959), *cert.* denied 365 U. S. 803 (defendant was indicted for murder in the first degree. At trial, evidence of another killing which resulted in defendant's acquittal was introduced to prove defendant's state of mind. The Court affirmed holding that the acquittal in no way barred the introduction of the evidence which was relevant in determining defendant's intent).

In an unbroken line of decisions, the federal courts have consistently held that an acquittal on a prior charge does not bar the introduction of evidence of other crimes. In *Himmelfarb* v. *United States*, 175 F. 2d 924 (9th Cir. 1949), defendant was indicted in four separate counts for willfully failing to report certain income. At the conclusion of the State's proofs the trial judge dismissed two charges. Thereafter, defendant moved to strike all testimony relating to the counts of the indictment that had been dismissed. The Court of Appeals for the Ninth Circuit held that the trial court properly denied defendant's motion. The Court stated that the "evidence was not admitted to show that he committed another crime but merely to show his intent to act willfully, his intention and his state of mind." *Id.* at 941 *cert.* denied 338 U. S. 860.

Similarly, in *Pilcher* v. *State*, 14 F. 248 (5th Cir. 1902), defendant appealed from a judgment of conviction for the unlawful removal and concealment of distilled spirits. At trial the State proved that on the night before the crime defendant broke a lock and entered the warehouse from which the liquor had been removed. Defendant objected upon the ground that he had been indicted for breaking the lock and had been tried and acquitted. The Court affirmed holding that the evidence was properly admitted to show defendant's participation in a plan or scheme, and that the prior acquittal did not bar its introduction.

In *United States* v. *Feinberg*, 383 F. 2d 60 (2nd Cir. 1967), the Court of Appeals for the Second Circuit had occasion to pass upon a similar issue. There, defendant appealed from a judgment of conviction for transporting a stolen automobile in interstate commerce. At trial the State offered evidence indicating defendant's purchase of another automobile from the same illegal source. Defendant objected upon the ground that he had previously been acquitted of that charge. The Court was not persuaded and held that the evidence had been properly admitted. *Id.* at 71.

The above cited decisions indicate an almost universal judgment in jurisdictions throughout the country that an acquittal has no bearing on whether evidence of other crimes may be admitted. See also *Underhill's Criminal Evidence* §629 (3rd Ed. 1923); *Wharton's Criminal Evidence* §48 (1934). An acquittal merely exempts an accused from punishment and from another prosecution. It does not necessarily show that he was innocent.

Ashe v. *Swenson*, *supra*, is not to the contrary. That case merely holds that an issue once litigated may not be the subject of further prosecution. That in no way im-

plies, however, that the State is forever barred from using evidence merely because it was introduced at a former trial which resulted in acquittal. Clearly, such evidence may be admitted at a subsequent date to prove a fact which was never litigated or in dispute at the former trial.

Here, the evidence in question related to petitioner's state of mind, the paramount issue to be resolved by the jury at the second trial. Moreover, such proof disclosed a close relationship between Perwin and Mulvaney which eventually culminated in the unlawful agreement which formed the basis for the immediate prosecution.[4] Under the circumstances, the doctrine of collateral estoppel was in no way violated or, for that matter, even involved. Mulvaney's trial on the Vesper and Lewis conspiracies resulted in an acquittal and those charges were never before the jury at the second trial. The "issue of ultimate fact" relating to the Vesper and Lewis claims was never relitigated. The State was not collaterally estopped from introducing such proof.

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[4] That is not to say, as petitioner suggests, that a single conspiracy embracing the Vesper, Lewis and Taylor claims existed. Agreement is the gist of the offense of conspiracy. Common conspirators may, as here, participate in several separate and distinct agreements. Nevertheless, the evidence in question tended to show a close working relationship between Perwin and Mulvaney which existed prior to the Taylor conspiracy.

POINT IV

Assuming arguendo that petitioner Mulvaney's conviction was in violation of the principles of double jeopardy and collateral estoppel, petitioner Yormark was not prejudiced and lacks standing to raise the issue.

Petitioner Yormark argues that Mulvaney's conviction was in violation of the principles of double jeopardy and collateral estoppel and that their joint trial served to "contaminate" his defense (Pb20). He claims that evidence against Mulvaney was improperly admitted and served to prejudice him because the trial judge instructed the jury that "declarations and acts of each named co-conspirator could be weighed in assessing the guilt of every conspirator" (Pb20).

It is the State's position that established principles of double jeopardy and collateral estoppel are inapplicable and did not serve to bar Mulvaney's second trial. Even assuming the Mulvaney's conviction was improperly obtained, however, petitioner Yormark cannot claim any benefit arising out of such a constitutional error. Had Yormark been separately tried, the State would have been permitted to introduce evidence relating to Mulvaney and Perwin's complicity in the criminal scheme. Quite obviously, it would have been permissible to offer evidence relating to the nature and scope of the unlawful agreement as well as the manner in which the conspiratorial objectives were to be executed.[5] Thus, the acts and declara-

[5] While it is true that evidence relating to the Vesper and Lewis claims would not have been admissable against Yormark had there been a separate trial, this clearly is of no significance. Here, the trial court instructed the jury that only acts and declarations in furtherance "of the conspiratorial objective could be used as evidence against all co-conspirators. The Vesper and Lewis cases only related to Mulvaney's guilty knowledge and his participation in the conspiracy relating to the Taylor claim. Thus, the jury did not consider such evidence in determining whether Yormark was involved in the Taylor conspiracy.

tions of Mulvaney and Perwin would have been admissible against petitioner Yormark in any event. In fact, assuming that the Vesper, Lewis and Mozzocca claims all emanated from a single unlawful agreement, acts and declarations of Mulvaney and Perwin relating to the prosecution of those cases as well would similarly have been admissible against petitioner Yormark. Clearly, petitioner Yormark was in no way prejudiced and his application for a writ of certiorari should be denied.

CONCLUSION

None of the issues raised in petitioners' application are of such constitutional moment as to require this Court's review. For the aforesaid reasons, it is respectfully submitted that the petition for a writ of certiorari be denied.

Respectfully submitted.

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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1352

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Petitioners,

v.

STATE OF NEW JERSEY,
Respondent.

REPLY OF PETITIONERS ROBERT B. J. MULVANEY AND MILTON YORMARK ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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If four false accident claims are filed to defraud the same insurance company, no principle of law bars separate prosecutions for each alleged substantive offense.[1] Nothing in the instant petition seeks any change in that proper and effective tool of law enforcement. This petition does challenge, however, the prosecutorial tactic by which each such false claim—involving the same target company, the same *modus operandi*, virtually the same participants, and the same time span—is hypothesized to have arisen

[1] This Court has firmly rejected the "same transaction" theory of Double Jeopardy, *Ashe* v. *Swenson*, 397 U.S. 436 (1970) and no such theory is advanced herein.

from separate conspiratorial agreements. That tactic declares war upon the protection embodied in the Double Jeopardy Clause of the Constitution. It unleashes multiple conspiracy prosecutions extracted at will from a single scheme, and thus enables the State to place a man "twice in jeopardy," at least, for the "same offense". In this case, petitioner Mulvaney was put in jeopardy for a fourth time after prior acquittal on three false claim charges and three conspiracy counts extracted from them.[2]

With respect to the fourth false claim, Mulvaney was tried, not for participation in the substantive crime, but for membership in an allegedly fourth and "different" conspiracy underlying it. The State's response to this petition for writ of certiorari candidly acknowledges that the test for determining whether a "different" conspiracy exists is well-settled and fully applicable to the States for Double Jeopardy purposes. "The test is whether the conspiring parties entertain 'a common, continuing objective' embracing a series of criminal acts." (St. Br. p. 8). The burden of New Jersey's effort to avoid review here is an attempt to show that no such "common continuing objective" underlay the four false claims. It is vital in that regard to observe what the State does not dispute as well as what it points to as evidence of a fourth and "different" conspiracy.

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[2] Ironically, the State attempts to tar Mulvaney with not having argued "one conspiracy" before, during or "after" the first trial. (St. Br. p. 10) But unaware that a second trial would follow, Mulvaney apparently was content to rest upon his claim of innocence which the jury endorsed.

There is no dispute that all four claims and the four alleged conspiracies transpired during the same time period.[3] There is no dispute that the same insurance company was the target of the fraud or that the "hub" figure in all claims was the company's insider. There is no dispute that the *modus operandi* of all four claims was the same in every important respect, or that Mulvaney's role, vindicated by the prior jury, was the same as among the claims.

Upon what then does the State rely to rebut " 'a common, continuing objective' embracing a series of criminal acts?" Three thin factual allegations are offered:

1. Each claim is said to have been initiated pursuant to a separate telephone conversation between Cortese and Perwin, although the State ironically admits that, even as to this detail of the *modus operandi*, "the same pattern of events took place as before".[4] (St. Br. p. 10).

2. One claim involved fabricating an accident other than a fall (St. Br. 6).

3. A new figure, Vincent Morelli, was intimately involved in one, but not all, claims.

It is fundamental conspiracy law that the mere addition of a new conspirator does not lead to the

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[3] For a graphic illustration of the overlapping nature of the claims, see Petition, p. 7, note 8.

[4] Moreover, each conversation was a signal triggering a new claim, not a new agreement. Although the State conclusorily contends otherwise, it provides this Court with no supporting record citations.

formation of a "different" conspiracy.[5] *Lile* v. *United States*, 264 F. 2d 278 (9th Cir. 1959); see also *United States* v. *Wenzel*, 311 F. 2d 164 (4th Cir. 1962); *United States* v. *Kellerman*, 431 F. 2d 319 (2d Cir. 1970). Each of the other factual bases for carving up the scheme into separate conspiratorial agreements is no less gossamer. No doctrine known to conspiracy law even hints that all criminal objects of a single criminal scheme must be identical in all details or that each criminal act, pursuant to an established scheme, must have been conceived at the same moment. Only on appeal does the State take its convenient position. To the jury, it argued vigorously that each false claim was generated by a criminal apparatus, working "just like clockwork" (T-10, 380). This Court should not tolerate being told now that there was a new clock each time.

We recognize that whether a continuing scheme consists of one or more conspiracies is heavily dependent upon factual considerations varying from case to case. But this Court should not deny review upon that basis. For the question is by no means simply a matter of fact. To regard it as such is to abdicate to the jury, not simply the task of defining the "elastic, sprawling and pervasive offense" of conspiracy, *Krulewitch* v. *United States*, 336 U.S. 440, 445-46, but of giving meaning to the "same offense"

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[5] Typical of the statements articulating the law is: "After a conspiracy has been formed, the adherence to the criminal design by a new confederate does not constitute a different conspiracy." 264 F. 2d at 281.

criterion written into the Double Jeopardy Clause. Without legal guideance from the courts, juries are utterly unsuited to perform tasks of such moment.

Above all, it is for this Court to speak. Even if it cannot provide a bright-line definition of the conspiracy offense that will eliminate all Double Jeopardy issues, it can at least define minimum guidelines to be met before a continuing scheme may constitutionally be presented to more than one jury as more than one conspiracy. This Court has traditionally and usefully performed such a guideline function in related areas which likewise rest heavily upon particular factual constellations. (Cf. *Kotteakos* v. *United States*, 328 U.S. 750 (1946) with *Berger* v. *United States*, 295 U.S. 78 (1935) setting out the parameters of permissible variance in conspiracy cases.)

This case is a fully appropriate vehicle in which to announce such guidelines. It presents a set of facts which define the intolerable. The false claim scheme, masterminded and run by others, was simple, continuing, and repetitive. Petitioner Mulvaney proved himself innocently involved in three carved-up conspiracy charges and three ensuing false claims. But he was unable to do it again when a fourth conspiracy charge was presented to a new jury and evidence of his prior innocent involvement was admitted to show the similarity of the scheme the State insists was multiple. Mulvaney was, of course, never convicted of any substantive false claim and there

was no need even to charge him with that substantive crime if the conspiracy doctrine may be used as oppressively as it was here. No interest of law enforcement requires such prosecutorial latitude.[6] More importantly, the Constitution forbids it. This Court should take this occasion to say so.

Respectfully submitted,

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June 5, 1972

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[6] New Jersey sets out the charging alternatives open to it at p. 14 of its Brief. They prove the merit of this Petition. Apparently, the State claims to have rejected trying all four claims in one case upon the ground that petitioner Yormark and another defendant would have been prejudiced by evidence of the claims as to which they were not involved. *But evidence of those claims was introduced at the second trial by the State itself*, thereby infecting that trial with the prejudice upon which petitioner Yormark relies herein. (Pet. p. 20). Likewise, the State claims to have rejected trying all four claims against petitioner Mulvaney in one trial upon the ground that two trials of the Taylor claim would have "wasted the time of the trial court as well as that of the State and the defendants." (St. Br. p. 14). But two trials were held anyway and the substance of the first trial was relitigated in the second. The time of the court was not reduced and the time of the defendant Mulvaney was multiplied. Only the State was advantaged by placing him, and others, twice in jeopardy.